

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

77-1421

United States Court of Appeals
FOR THE SECOND CIRCUIT

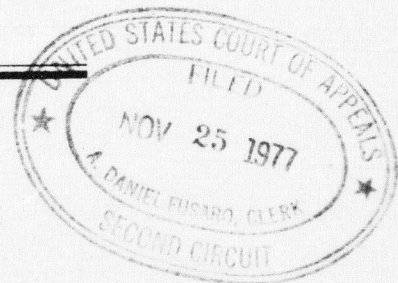
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
against

HOWARD WENDY, Esq.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR APPELLANT

HOWARD WENDY, Esq.
Attorney Pro Se
122 East 42nd Street
New York, New York 10017



PAGINATION AS IN ORIGINAL COPY

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1a
Docket Entries.

XXXXXX	0864	HARRIS, HERVEN M.	06 29 76	0602	01
* 0208 1	JUVENILE	No. of Defs * 01	Yr	Docket No	Def
OFFENSES CHARGED		ORIGINAL COUNTS		U.S. MAG. CASE NO.	
26:7201 Tax evasion.		1		BAIL • RELEASE	
				☐ AM ☐ Fugitive ☐ Denial ☐ Set ☐ Pers. Recog. ☐ PSA \$ 000 conditions ☐ Date ☐ 10% Deposit ☐ Surety Bond ☐ Bail Not Made ☐ Collateral ☐ Status Changed (See back) ☐ 3rd ☐ Other	
SUPERSEDING COUNTS					
II. KEY DATES & INTERVALS					
ARREST	INDICTMENT X	ARRAIGNMENT	TRIAL		
6-29-76	6-29-76	Trial Set For	Voor Dire		
First Appearance	First Appearance	Trial Began	Trial Ended		
			Disposition of Charges		
			1-7-77		
			SENTENCE		
			☐ On All Charges ☐ On Lesser Offense ☐ Dismissed ☐ WOP ☐ W/P ☐ On Government's Motion		

U.S. ATTORNEY GENERAL
Jeremy G. Epstein
791-0036

ATTORNEYS
Kassner and Detsky
122 E.42 St, NYC, 10017 682-6600

DATE	DESCRIPTION	EXCLUDABLE DELAY (a) (b) (c) (d)
6-29-76	Filed indictment.	
7-8-76	Deft. with attorney Howard Wenry pleads not guilty. 10 days for motions. Bail fixed at \$20,000. un- secured. P.R.B. Bail limits extended to Continental U.S. & Quebec. To be F/P. Case assigned to Goettel, J.	
7-9-76	Filed defts. notice of appearance by: Kassner and Detsky of 122 E.42 St, NYC 10017.	
7-8-76	Filed appearance bond in the amt. of \$20,000 PRB(unsecured)	
7-19-76	Filed notice of appearance of Kassner & Detsky as atty for deft	
8-16-76	Filed Govt's notice of readiness for trial on or after 8-18-76	
8-18-76	Filed consent order extending bail limits...Goettel, J.	

OVER.

Docket Entries.

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs

HARRIS, HERVEN M.

page 3

76

602

Docket No.

01

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
	(Document No.)				
10-17-77	Filed def't's affid & OSC why a stay of execution or of any proceedings to enforce the collection of the fine imposed upon Howard Wendy Esq. on Sept 8, 1977 in the sum of \$1500.00 should not, issue etc ret 10-13-77 at 10:45 A.M. in room 301GRIESA, J.				
10-18-77	Filed mormo end on OSC dated 10-17-77 The motion is granted & the payment of the fine is stayed until determination of the appeal, provided that if the direction of the fine is affirmed, the fin is to be paid within 20 days after issuance of the mandate So ordreed GRIESA, J. M/N (copy mailed to Howard Wendy 122 E 42nd St N.Y.C. 10017) (US Atty notified				
10-26-77	Fld. affidavit of actual engagement. XX				
10-26-77	Fld. letter from Paul Vizcarrondo Jr. to Judge Goettel.				
10-26-77	Fld. transrcipt of record of proceedings dated. August 24, 1977.				
10-28-77	Filed memorandum of Judge Goettel to Judge Pollack				

Docket Entries.

DISPOSITIVE THE APPLICABLE DOCKET ENTRIES SHOW IN SECTION V. ANY OCCURRENCE OF EXCLUDABLE DELAY PLI-18 USC § 316(h)

IV. PROCEEDINGS (continued)		PAGE TWO		V. EXCLUDABLE DELAY	
DATE	(DOCUMENT NO.)	EXCLUDABLE DELAY	EXCLUDABLE DELAY	EXCLUDABLE DELAY	EXCLUDABLE DELAY
10-12-76	Pre-Trial Conference held. Date set for trial. 12-13-76 at 10:00 A.M. GOETTEL, J.				
11-29-76	Filed Consent Order extending Territorial Bail Limits to and from and within the District of North Carolina and the District of Virginia. So Ordered GOETTEL, J.				
12-20-76	Filed affidavit for W/H/C ad testificadum ret 12-29-76				
1-2-17-76	Filed true copy of USCA Mandate The petition for a writ of mandamus is denied M/N				
1-3-77	Filed Affid for W/H/C Ad Testificadum Ret 1-5-77				
12-13-76	Trial adj ro 12-19-76 PAUL VISCARANO AUSA				
1-4-76	Trial begun before Judge Goettel & Jury (2nd) HERBERT KASNER UP COMPTON				
1-5-76	Trial cont'd				
1-6-77	"				
1-7-77	Trial cont'd & concluded Verdict DEFT NOT GUILTY Bail Exonerated... Goettel, J.				
1-10-77	Filed Govt's request for the Voir Dire				
1-10-77	Filed Govt's request to charge				
1-24-77	Filed W.H/C AD Testificadum with marshal's return				
2-8-77	Filed Transcript of record of proceedings, dated AUG. 19, 1976				
2-8-77	Filed Transcript of record of proceedings, dated SEPT 7, 1976				
2-8-77	Filed Transcript of record of proceedings, dated SEPT 21, 1976				
2-8-77	Filed Transcript of record of proceedings, dated OCT 12, 1976				
2-8-77	Filed Transcript of record of proceedings, dated OCT 13, 1976				
2-8-77	Filed Transcript of record of proceedings, dated OCT 14, 1976				
4-13-77	Filed Transcript of record of proceedings, dated 1-4, 5, 6, 7, 1977				
9-8-77	Filed ORDER OF CONTEMPT.....that Howard Wendy, shall pay to the Clerk of this Court, on or before Oct. 15, 1977, a cashier's or certified check, made payable to the Treasurer of the U.S., in the amount of fifteen hundred dollars (\$1500.00) Griesa, J. m/n				
10-12-77	Filed notice of appeal from order of Civil Contempt entered in this action 9-8-77..Copy mailed to Howard Wendy(Pro-Se) at 122 E. 42nd St. NYC 10017....				

CONTINUED ON PAGE No. 3

FINE AND RESTITUTION PAYMENTS					
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

Notice of Appearance, July 9, 1976.

USA-333-187
Rev. 2/4/66

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

HERVEN HARRIS

TO: RAYMOND F. BURGHARDT, Clerk
United States District Court
Southern District of New York

S I R :

You are hereby notified that I appear for

HERVEN HARRIS

the defendant in the above-entitled action.

Dated: New York, New York

(PRINTED)

HOWARD WENDEL

Attorney for Defendant

(PRINTED)

KASSNER & DETSKY

122 E. 42nd St

N.Y.C. 10017

212-682-6600

Telephone Number.

JUL 9 1976

76 ER 602
6-LL

Notice of Appearance, July 19, 1976.

USA-333-187
Rev. 2/4/66Judge Goettel. 4 my copy
76-2110
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----- x

UNITED STATES OF AMERICA :

-v- :

HERVEN HARRIS :

76 Cr. 602
(Goettel, J.)----- x
TO: RAYMOND F. BURGHARDT, Clerk
United States District Court
Southern District of New York

S I R :

You are hereby notified that I appear for

HERVEN HARRIS

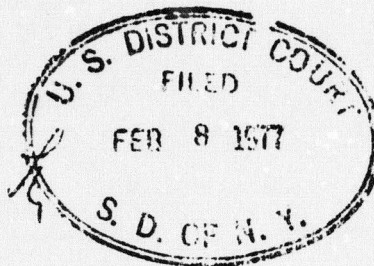
the defendant in the above-entitled action.

Dated: New York, New York

(PRINT) HOWARD WENDY
Attorney for Defendant(PRINT) KASSABER & DIETSKY
122 E. 42nd STN.Y.C.212 - 682 - 6000

Telephone Number.

Transcript of Proceeding, August 18, 1976.

12

1 lzmch

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----x
5 UNITED STATES OF AMERICA :

6 v. :

76 Cr. 602

7 HERVEN M. HARRIS, :

8 Defendant. :

9 -----x
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11
12 Before: HON. GERARD L. GOETTEL, District Judge.13
14 New York, New York
15 August 18, 1976
16

17 Appearances:

18 ROBERT B. FISKE, JR., Esq.,
19 United States Attorney for the
20 Southern District of New York,
By: JEREMY G. EPSTEIN, Esq.,
Assistant United States Attorney.21 HOWARD WENDY, Esq.,
22 Attorney for Defendant.
23
24
25

Transcript, August 18, 1976.

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lzmch

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(Case called)

3

MR. EPSTEIN: The Government is ready.

4

THE COURT: Where does discovery stand in

5

this matter?

6

MR. EPSTEIN: Your Honor, a letter was sent

7

to me by Mr. Wendy on Monday, which I have not received.

8

He showed me a draft of it this morning. I don't think we

9

are going to have any trouble complying with any of his

10

discovery demands.

11

One thing I did mention to him that he

12

apparently wants that we are not willing to turn over at

13

this point is the report of the special agent of the IRS

14

who investigated this case. I don't think that is dis-

15

coverable at this point and we may turn it over subsequently,

16

but I don't think we are obligated to, and we would oppose

17

that request.

18

His requests for all other materials we would

19

consent to. I don't think there will be any problem.

20

THE COURT: There are no pending motions at

21

the present time, are there?

22

MR. WENDY: Your Honor, I am unable to make

23

motions. I was unaware that my client even had an adminis-

24

trative hearing. I have just come onto the case and, prior

25

to discovery, I am unable to determine what motions I want

Transcript, August 18, 1976.

1 lzmoh

3

2 to make. My own client is uncommunicative. He is not
3 aware of what has happened or what is going on, so I would
4 have to wait until at least the U. S. Attorney's Office
5 offers me the documents before I am able to make any
6 intelligent motions.

7 THE COURT: Are you assigned or retained
8 counsel?

9 MR. WENDY: Retained.

10 THE COURT: Why is your client being so
11 reticent with you?

12 MR. WENDY: I think it's more ignorance on his
13 part, your Honor.

14 THE COURT: Obviously, if he went through
15 administrative procedures, he is aware that he went through
16 them.

17 MR. WENDY: I just saw that he was present
18 at the administrative hearing, your Honor, and that was the
19 first I was aware of it.

20 THE COURT: What does RSB trial indicate on
21 this, Mr. Epstein?

22 MR. EPSTEIN: Your Honor, the indictment was
23 filed on June 29. That was the day on which the speedy
24 trial began running, so it's less than two months ago.

25 THE COURT: The defendant got an extension of

1 lunch

4

2 time for motions until August 16. This is August 18.

3 And you tell me you haven't even started
4 considering what motions you have to make?

5 MR. WENDY: Well, without a bill of particulars,
6 your Honor, without any knowledge whatsoever of the case,
7 without -- I have been informed today by the U. S. Attorney
8 that there are over forty bank accounts involved in this
9 case, your Honor. How could I intelligently do anything?
10 I don't even know where to begin preparing the case.

11 THE COURT: I think you had better educate
12 yourself rapidly and start doing it.

13 MR. WENDY: I'm trying, your Honor. I went
14 down and, you know, I will do this just as soon as I get
15 the information from the U. S. Attorney.

16 THE COURT: He is not holding you back. He
17 said, with the exception of one report, everything else is
18 available to you.

19 MR. WENDY: If I am willing to go right from
20 the courthouse to his office to pick it up if he wants to
21 give it to me, your Honor.

22 THE COURT: I think you had better do that and
23 I think we had better have another conference in a week
24 because we are not even in a position to start talking about
25 a trial date because you don't even know what the case is

Transcript, August 18, 1976.

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2 about.

3 MR. WENDY: That is correct.

4 THE COURT: Give him another date in a week.

5 THE CLERK: Monday, the 30th. That will be

6 in this courtroom. 9:30.

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I (clerk) hereby certify that the foregoing
is a true and correct transcript of the
say (word) said and signed by (our)
reporters in the presence of this proceeding.

Leon Glick
Court Clerk
U. S. District Court

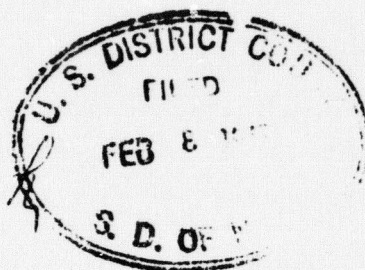
Transcript of Proceeding, September 7, 1976.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----x
UNITED STATES OF AMERICA :

-vs- :

HERVEN M. HARRIS, :

Defendant :

76 Cr. 602

-----x
B e f o r e :

HONORABLE GERARD L. GOETTEL,
District Judge

New York, New York
September 7, 1976--11:45 a.m.

A P P E A R A N C E S :

ROBERT B. FISKE, JR., ESQ.,
United States Attorney for the
Southern District of New York
BY: JEREMY G. EPSTEIN, ESQ.,
Assistant United States Attorney

KASSNER & DETSKY, ESQS.,
Attorneys for Defendant
BY: HOWARD WENDY, ESQ., of Counsel

1 slds 2

2 THE COURT: We had a prior conference on this
3 case.

4 Were you present at that prior conference?

5 MR. WENDY: Yes, I was, sir.

6 THE COURT: Is this the case in which you told
7 me that you didn't really know what your client's position
8 was going to be; he had not cooperated with you sufficiently
9 to evaluate the defense?

10 MR. WENDY: I had no basis for even knowing.
11 He doesn't know where the government came up with the amounts,
12 and I certainly didn't know.

13 THE COURT: Well, I believe there was an administra-
14 tive proceeding on this at one point, was there not?

15 MR. WENDY: I had learned about it the morning
16 of the last hearing, your Honor.

17 THE COURT: Have you looked into it since then?

18 MR. WENDY: I had a conference with my client
19 and he told me that there was an administrative hearing, and
20 I don't want to go into it, whether he felt he was adequately
21 represented --

22 THE COURT: Was there a record made at that
23 hearing, a transcript or anything of that nature?

24 MR. EPSTEIN: There was a memorandum prepared
25 by the IRS attorneys which I will turn over. It is very

1 slides
2 brief.

3

3 THE COURT: Nothing verbatim, though?

4 MR. EPSTEIN: No.

5 THE COURT: And he had different counsel at that
6 time?

7 MR. WENDY: Yes.

8 THE COURT: How long a trial do you expect this
9 to be?

10 MR. EPSTEIN: Your Honor, it greatly depends on
11 the extent to which Mr. Wendy will stipulate to the authen-
12 ticity of bank records, of which there are a great many.
13 I think if we can stipulate to the authenticity of much of
14 the evidence it can be really rather brief.

15 THE COURT: What does that mean, a day or two?

16 MR. EPSTEIN: Let's say two days. If there are
17 no stipulations it could be five or six or ten days.

18 THE COURT: Mostly from your standpoint, how-
19 ever, the time consuming aspect is the calling of witnesses
20 to authenticate records?

21 MR. EPSTEIN: That is correct.

22 THE COURT: And you feel, Mr. Epstein, for some
23 reason or other we are better off in not setting a date
24 but adjourning this?

25 MR. EPSTEIN: I received it the day before I went

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Transcript, September 7, 1976.

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2 is my suspicion, but since he is not here to defend himself,
3 we will never know.

4 MR. EPSTEIN: Your Honor, I wonder if 1:00 o'clock
5 could be equally convenient on the 21st. I am going to be
6 on trial starting the 20th.

7 THE COURT: Till 1:00 p.m. that will be.

8 MR. EPSTEIN: Will that be 518?

9 THE COURT: 518.

10 If there is nothing further, we are done.

11 MR. EPSTEIN: Thank you.

12 MR. WENDY: Thank you very much, your Honor.

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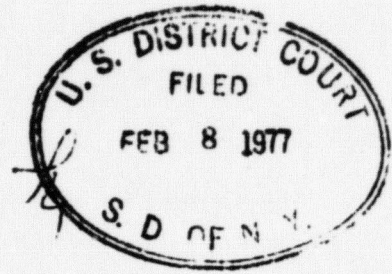
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I hereby certify that the foregoing
is a true and correct transcript of the
testimony and exhibits from my (our)
notes of this proceeding.

[Signature]
Court Reporter
E. H. [unclear]

V



1 lhas

2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 ----- -X

5 UNITED STATES OF AMERICA :

6 - against - : 76 Crim. 602

7 HERVEN M. HARRIS, :

8 Defendant. :

9 ----- -X

10 B e f o r e :

11 HONORABLE GERARD L. GOETTEL,

12 District Judge.

13
14 New York, New York
15 September 21, 1976 - 1:00 p.m.

16 A p p e a r a n c e s :

17 ROBERT B. FISKE, JR., Esq.

18 United States Attorney for the
19 Southern District of New York

20 BY: JEREMY EPSTEIN, Esq.

21 Assistant United States Attorney

22 HOWARD WENDY, Esq.

23 Attorney for Defendant
24
25

1 lhas

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2 (Case called)

3 MR. EPSTEIN: We are here to determine a trial
4 date and whether there are any motions defense wanted to
5 make. You had ordered us to more or less complete
6 discovery by today.

7 THE COURT: This is an internal revenue case,
8 isn't it?

9 MR. EPSTEIN: Yes, a tax case.

10 THE COURT: How long a trial did you tell me
11 you anticipated?

12 MR. EPSTEIN: The estimate varies depending
13 on what we can stipulate to. If we can stipulate, the
14 government case would take as little as two days. If we
15 can't, I imagine it would take well over a week, perhaps
16 two.

17 THE COURT: I assume by now defense counsel
18 has had a chance to apprise himself of the administrative
19 proceedings.

20 MR. WENDY: Yes, your Honor. I have even gone
21 a couple of steps further. The U. S. attorney has been
22 quite helpful in supplying the information we requested,
23 and I spent a few days going over it.

24 THE COURT: What do you think the prospects
25 are of stipulating to the various technical aspects in the

1 lhas
2 case?

3

3 MR. WENDY: I have no idea of what he wishes us
4 to stipulate to.

5 MR. EPSTEIN: I am referring, your Honor, to
6 the authenticity of the bank records and the various
7 expenditures that the defendant made. Otherwise, we would
8 have to get bank officers in for every bank and merchants
9 in for everything the defendant purchased. That would be
10 the most time consuming aspect of the trial, as it appears
11 to us at this point anyway.

12 THE COURT: Your bank deposits are very
13 substantial, in six figures. The cash expenses are under
14 \$18,000. I would assume that you are not going to call
15 every little tiny purchase here and there, that you are
16 only going to go for the substantial ones?

17 MR. EPSTEIN: That's correct, your Honor.
18 The \$17,000-some-odd represents only four or five trans-
19 actions, as I recall.

20 THE COURT: I assume they could be covered
21 in half a day. How many banks are you dealing with with
22 respect to the deposits?

23 MR. EPSTEIN: The defendant had 22 different
24 accounts. There are not 22 different banks because some
25 banks he had several accounts in. I would imagine some-

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2 thing in the vicinity of ten banks. About ten, twelve
3 banks, your Honor.

4 THE COURT: That could be time-consuming.
5 You have not given any consideration yet as to whether or
6 not you are going to concede the authenticity of the bank
7 records and the fact that they were your client's accounts?

8 MR. WENDY: No, your Honor, I have not. At
9 this moment, your Honor, one of the purposes of this
10 hearing was to set a date for motions, and I was just
11 discussing it with the U. S. attorney. I am not sure
12 which method they are going to try to prove their case by,
13 whether it is the net worth method, the specific items --

14 THE COURT: It doesn't look like net worth to
15 me. It looks like unreported income as revealed by bank
16 deposits and cash expenses.

17 MR. EPSTEIN: That is what it is going to be,
18 mostly bank deposits and cash expenditures.

19 MR. WENDY: The net worth, is that -- one of
20 the things, your Honor, and it is very important,
21 naturally, is a bill of particulars. I was just at the
22 U. S. attorney's office all day Friday, I spent the better
23 part of the whole day going through -- sifting through
24 the information, just trying to hit the highlights of
25 what I thought were important, you know, as to motions.

Transcript, September 21, 1976.

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1 lhas

2 One as to venue, whether this is the proper place for the
3 case --

4 THE COURT: Where did Mr. Harris reside at the
5 time he filed these returns?

6 MR. WENDY: In New Jersey.

7 THE COURT: What's the theiry of New York venue?

8 MR. EPSTEIN: Your Honor, it is our under-
9 standing that in 1971 Mr. Harris resided in Mount Vernon
10 and that the expenditures and most of his activities were
11 there. In addition, we will prove that the return was
12 prepared in the Southern District. I think that's
13 sufficient.

14 MR. WENDY: Your Honor, I mean the major item
15 in the case is the purchase of a home for \$60,000-some-odd
16 in New Jersey in the year in question, which is his
17 principal residence. Obviously, if he purchased the home
18 during that year, his return is filed in the subsequent
19 year, and he obviously lived in New Jersey at that time.
20 Residence is the predominant factor in venue. This is
21 just one of the things, your Honor, that I feel should
22 properly be brought before this Court.

23 THE COURT: To simplify it a bit, Mr. Epstein,
24 it is not the case here, but just to focus on it, if someone
25 who lived all their life in New Jersey and who filed all

Transcript, September 21, 1976.

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2 their tax returns in New Jersey were to come to New York
3 to get assistance for preparation of the return from a
4 New York tax lawyer or tax accountant and then were to go
5 back and file the return in New Jersey, would you believe
6 that the mere assistance of the preparation of the
7 return in New York, assuming for the moment that the
8 accountant or lawyer has no knowledge of its falseness
9 and is not a co-defendant, grounds venue in this district?

10 MR. EPSTEIN: As a matter of discretion, your
11 Honor, I imagine that the Justice Department would
12 probably choose to prosecute the case in New Jersey, but
13 I think under the law, venue might well lie in the
14 Southern District. As I understand it, there are alterna-
15 tive bases, either where the return was received, and I
16 believe it was received in the Manhattan district, or
17 where the return was prepared or where the defendant
18 resided and incurred his income.

19 THE COURT: You think that even if in fact he
20 did have a Jersey residence, he mailed his return to
21 Manhattan District Office of the Internal Revenue?

22 MR. EPSTEIN: I believe that's where it was
23 received, your Honor.

24 THE COURT: Is there a New Jersey Internal
25 Revenue Service Office?

Transcript, September 21, 1976.

1 has

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2 MR. EPSTEIN: I don't know.

3 THE COURT: I'd be inclined to agree with you
4 that regardless of where you reside, if you send in a
5 return to a given office and that office received it,
6 that the offense is also prosecutable in that district,
7 but I had assumed that New Jersey had its own district
8 office.

9 MR. WENDY: I believe the district office
10 for Jersey is Pennsylvania, Philadelphia is where the
11 return should be properly sent. I further believe that
12 what you say has merit, that the District Court has wide
13 latitude in the question of venue, but most of the cases
14 that I have read, and I have had only a very short time
15 to research this, show that the prime consideration is the
16 residence of the taxpayer, and that is where venue most
17 properly should lie.

18 THE COURT: Let's not confuse two aspects of
19 venue. One aspect of venue is where the case may in legal
20 theory be tried. Obviously there has got to be a legal
21 basis for trying it in this venue or it can't stay here.
22 There are also sometimes, more often in civil cases than in
23 criminal, considerations of transfer of venue because of
24 the interests of justice, which generally comes down to
25 where the witnesses come from or where the proof comes

Transcript, September 21, 1976.

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3 I would think from what Mr. Epstein has told
4 us about his case that you are not going to prevail on
5 that sort of an approach because the banks and most of
6 the witnesses concerning expenses come out of the New York
7 Southern District. But if in fact there is no grounds for
8 venue here because the return was not filed here and the
9 defendant did not reside here and that the mere consulting
10 of tax experts in this district doesn't ground venue,
11 that's else again.

12 In any event, if you are going to move on
13 venue grounds, I want the motion filed within ten days.
14 It does not have to be returnable within ten days, just
15 filed within ten days.

16 MR. WENDY: Certainly will, your Honor. I was
17 in the U. S. attorney's office on Friday, and that was --
18 in going through the files which Mr. Epstein made
19 available to me, I noticed that the return was filed,
20 I thought originally that it was '71, but it was a '72
21 return filed in Philadelphia. There was no evidence one
22 way or the other as to where the '71 return was filed.
23 To this date I don't even know that it was filed in the
24 Manhattan district. It could very well have been in the
25 Philadelphia district because the evidence that I saw in

Transcript, September 21, 1976.

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2 the U. S. attorney's file is that the '72 return was
3 filed in the Philadelphia area, which is the proper place
4 for the residents of New Jersey.

5 That's the kind of thing that came out of my
6 discovery on Friday, and I have a whole lot more to sift
7 through. There was literally a cartonful of stuff, and
8 there is only so much I can do in one day.

9 THE COURT: The threshold thing I would think
10 is finding out where the return was sent. That's easy
11 compared to the other things.

12 MR. WENDY: That's again within the province of
13 the U. S. attorney's office. They know where the '71
14 return was filed.

15 THE COURT: Nevertheless, I want the motion on
16 venue, if there is to be one, within ten days. If there
17 is to be a motion for further discovery beyond what is
18 provided to you or promised you in the letter of September 9,
19 I want that within ten days.

20 So far you have not come up with anything
21 specific that you want from Mr. Epstein that he has
22 specifically refused you, I take it.

23 MR. WENDY: No, except for the list of
24 witnesses which Mr. Epstein feels I am not entitled to.

25 THE COURT: And you are not.

Transcript, September 21, 1976.

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2 MR. WENDY: And apparently I am not.

3 THE COURT: He has agreed that he is not going
4 to use the materials seized by the Mount Vernon police.

5 MR. WENDY: I strongly take exception to that
6 reference in the letter, and I believe that that seriously
7 prejudices the Court's judgment before the trial --

8 THE COURT: This is a jury case, isn't it?

9 MR. WENDY: Yes, it is going to be a jury case.
10 However, I do believe that it was -- as a matter of fact,
11 I mentioned this to Mr. Epstein, that that was totally
12 uncalled for and unfair to allow the criminal record of
13 the defendant to be brought before this Court and to
14 prejudice him before a trial.

15 THE COURT: It doesn't prejudice me in the
16 slightest. I not only will ignore it, by the time we get
17 to trial I will have forgotten about it. This is not to
18 say that if it comes out during the course of the trial
19 for some other reason and for some other purpose it may not
20 create some problems, but we will worry about that when we
21 reach that point.

22 MR. WENDY: To date, your Honor, I think within
23 the next ten days I could certainly have all the motions
24 that I wish to make brought to the attention of
25 Mr. Epstein, and if I have any difficulty at that time I feel

Transcript, September 21, 1976.

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2 it would be necessary to have another conference.
3 Otherwise, I have no objection to setting a trial date,
4 your Honor.

5 THE COURT: Do you want to set a date right
6 now? My problem with that is I don't know if we have a
7 three-day trial or a six-day trial, which depends in part
8 upon whether or not you are going to stipulate to things.

9 MR. WENDY: As I said, this is a serious case
10 and there is a jail term involved, and I certainly can't
11 stipulate to anything in a blanket fashion. If he is
12 willing to tell me what he wishes to stipulate and
13 presents it to me, at that time I will make the decision.

14 THE COURT: Give him something in writing,
15 Mr. Epstein, indicating what you want stipulated to and
16 have him say yes or not to all of them. We have to try
17 this case before the end of the year.

18 MR. WENDY: December 29, your Honor.

19 MR. EPSTEIN: December 29.

20 THE COURT: I think it would be wisest if I
21 set another date right now for purposes of setting a trial
22 date at that time or consider orally any unresolved disputes,
23 and that will be October 7 at 5 o'clock.

24 MR. WENDY: In the courtroom, your Honor?

25 THE COURT: Yes, this courtroom. That does not

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2 relieve you from the necessity of filing your motions
3 within ten days, if you are going to make the motions.

4 MR. WENDY: One is very simple now.

5 Mr. Epstein, will you furnish me with a bill of particulars?

6 MR. EPSTEIN: Your Honor, first of all, I don't
7 know what Mr. Wendy wants in a bill of particulars.
8 Secondly, I have made available the entire file, so I am
9 somewhat at a loss to understand what he wants me to
10 particularize.

11 THE COURT: I think you would have to be a
12 little more specific as to what it is you don't know.
13 Obviously, one particularrr you want is in what district
14 office was the return filed. Mr. Epstein has told you he
15 believes it to be Manhattan.

16 MR. WENDY: If he will state that for a fact,
17 I will accept it.

18 MR. EPSTEIN: I will have to check it, but I
19 will certainly tell Mr. Wendy as soon as I know.

20 THE COURT: You are also interested in the banks
21 involved in the accounts and the vendors involved in the
22 expenses, but he is going to tell you that by asking you
23 whether you will stipulate that these expenses were made
24 and these accounts maintained. I think you will get the
25 information you need.

Transcript, September 21, 1976.

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2 All right, gentlemen, I will see you on
3 October 7.

4 (Court adjourned)

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6
7 I hereby certify that the foregoing
8 is a true and accurate transcript, to the best
9 of my (our) skill and ability, from my (our)
10 stenographic notes of this proceeding.

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Official Court Reporter
D. H. [illegible]

Transcript of Proceeding, October 12, 1976.

bssr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA, :

- v s - :

76 Cr. 682

HERVEN M. HARRIS, :

Defendant. :

-----x

B e f o r e :

HON. GERARD L. GOETTEL,

District Judge.

New York, New York
October 12, 1976 - 4:30 p.m.

A p p e a r a n c e s :

ROBERT B. FISKE, JR., ESQ.,
United States Attorney for the
Southern District of New York;
By: JEREMY G. EPSTEIN, ESQ., of Counsel.

HOWARD WENDY, ESQ.,
Attorney for defendant.

Transcript, October 12, 1976.

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2 [Case called - both sides answer ready.]

3 THE COURT: This is for the sole purpose of
4 setting a trial date?

5 MR. EPSTEIN: That is my understanding, your
6 Honor.

7 THE COURT: Didn't we have a trial date?

8 MR. EPSTEIN: No, I don't think so. One was
9 never set.

10 THE COURT: How long a trial is this?

11 MR. EPSTEIN: The estimate is a problem. It
12 depends on the number of business records, the accuracy
13 of which Mr. Wendy will stipulate to at the trial, it
14 could take anywhere from two days to about six on the
15 Government's case.

16 THE COURT: You have been telling me that for
17 a long time. Haven't you two reached the point of
18 deciding what is going to be stipulated to and what is not?

19 MR. EPSTEIN: Mr. Wendy has been given the
20 opportunity to see our records. He has indicated to me
21 he wants to come back again. I don't know what decision
22 he has reached on it.

23 THE COURT: Mr. Wendy?

24 MR. WENDY: Nothing has been offered, you
25 know, for me to stipulate to, so at this time I cannot

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2 stipulate to anything.

3 The last time we had a conference it was
4 discussed about the motion for change of venue and it
5 was decided that the Southern District would be the
6 proper venue, as far as the defendant is concerned.

7 Unfortunately, your Honor, I cancelled last
8 week's conference because I have been ill. I have not been
9 well. But I did expect in the next couple of weeks to
10 go back and look at this -- you know, this voluminous
11 amount of material, and until the Government tells me
12 what they wish my client to stipulate to, I certainly
13 can't stipulate to anything.

14 THE COURT: What is our speedy trial deadline
15 on this?

16 The indictment was filed June 29, so it has
17 to be tried before December 29.

18 All right. I will commence the trial on
19 December 13th.

20 MR. EPSTEIN: That is satisfactory to the
21 Government, your Honor.

22 MR. WENDY: That is fine with me, your Honor.

23 THE COURT: For the present time, I am putting
24 it down for a one-week trial. If you determine that
25 that estimate is too long or too short, you let me know.

[Time noted: 4:50 p.m.]

Transcript of Proceeding, December 13, 1976.
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

vs. :

76 Crim. 0682

HERVEN M. HARRIS, :

Defendant. :

----- x

Room 906

December 13, 1976

Before:

HON. GERARD L. GOETTEL,

U. S. District Judge

Appearances:

ROBERT J. FISKE, ESQ.

U. S. Attorney

BY: PAUL VISCARRONDO, ESQ.

Assistant U. S. Attorney

KASSNER DETSKY WENDY

Attorneys for Defendant

BY: HOWARD WENDY, ESQ.,

of Counsel

1 rb ja 2 Transcript, December 13, 1976.

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2 THE COURT: Is the defendant present?

3 MR. WENDY: Did you say present, your Honor?

4 THE COURT: Yes.

5 MR. WENDY: Yes, your Honor.

6 MR. VISCARRONDO: Your Honor, the Government

7 is ready.

8 THE CLERK: Is the defendant ready?

9 MR. WENDY: No, your Honor.

10 THE COURT: Are you Mr. Kassner?

11 MR. WENDY: No. I am Howard Wendy, your

12 Honor.

13 THE COURT: You are the attorney who filed
14 a notice of appearance?

15 MR. WENDY: I am from Kassner, Detsky &
16 Wendy, your Honor.

17 THE COURT: The notice of appearance in
18 this case clearly reads Howard Wendy of the firm of
19 Kassner & Detsky. You have been the attorney on this
20 case from the start.

21 MR. WENDY: Your Honor, if I may just
22 state two reasons: One, if Mr. Kassner weren't actually
23 engaged, your Honor, I doubt whether he would be able to
24 start the trial, as the Government just handed us
25 this material this morning (indicating).

Transcript, December 13, 1976.

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2 THE COURT: What material?

3 MR. WENDY: This material (indicating).

4 THE COURT: What is "this"?

5 MR. WENDY: I have not even had time to
6 inspect it, your Honor.

7 Friday afternoon I wasn't even informed
8 what it was, but I was told I would get some material.

9 MR. VISCARRONDO: Could I make a statement
10 about that, your Honor?

11 That is 3500 material -- well, it is material
12 relating to a witness that the Government discovered was
13 available for the first time on Friday afternoon. It is
14 not technically 3500 material because I don't believe it
15 relates to this defendant at all. But out of an excess
16 of caution we are giving it to them.

17 I called Mr. Wendy's firm on Friday afternoon
18 and spoke to Mr. Kassner and told him he could come and
19 pick it up on Saturday morning, but Mr. Kassner declined
20 and asked me to bring it into court on Monday.

21 MR. WENDY: Your Honor, if I may show the
22 Court -- I would like the Court to ask the United
23 States Attorney when he first became aware of this.

24 One of the representations they gave me in
25 September was there would be no witnesses with a criminal

1 rb ja 4

2 record, and on Friday evening --

3 THE COURT: He said he learned of him Friday.

4 MR. WENDY: I would like to question about
5 that, your Honor. This is a witness who has testified
6 for the Government approximately fifty times --

7 THE COURT: Who is going to represent the
8 defendant in this case?

9 (At the side bar):

10 MR. WENDY: I have never tried a case.
11 My background is tax and accounting, and I am assisting
12 Mr. Kassner. I have no experience as a trial attorney,
13 I have never tried a tax case, and I don't feel competent
14 to try this tax case.

15 THE COURT: This case was set down for
16 trial more than two months ago. The date has never
17 been changed, and it has never been in question, and
18 we are operating under the speedy criminal trial rules.

19 You personally entered an appearance in this
20 case and have made all prior appearances. I am sure
21 you are aware of the recent Second Circuit case, in re
22 John Joseph Sutter, in which the attorney was assessed
23 fines of \$500 a day for doing precisely what Kassner
24 is attempting to do here, namely, on the last working
25 day before trial announced he was engaged in a state

Transcript, December 13, 1976.

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1 proceeding and would not be prepared to go ahead until
2 some later date. The decision as to what you are going
3 to do is going to be yours, but if this case is delayed,
4 it is going to be at the rate of \$500 a day fine against
5 Mr. Kassner.
6

7 You should never have entered an appearance
8 in this case if you were not qualified to try the case.

9 MR. WENDY: Your Honor, I entered an
10 appearance on behalf of the firm, not on behalf of myself.
11 If I signed the paper, "Howard Wendy," it was in error.

12 THE COURT: There has never been the slightest
13 indication that Mr. Kassner was going to be trial
14 counsel, but I consider that to be irrelevant. If he was,
15 he should be ready to proceed today.

16 MR. WENDY: If I may explain what happened
17 with Mr. Kassner, he was supposed to start the state
18 proceedings on Monday and, in fact, did begin it on Monday.
19 They selected jurors, and the whole jury panel was dis-
20 qualified and a mistrial was called, and the judge started
21 the trial again on Wednesday -- I am not sure whether it
22 was Wednesday or Thursday.

23 In addition, I am told the judge is sitting in
24 the calendar part and only devotes three or four hours
25 a day to this case, otherwise Mr. Kassner would be here

1 rb ja 6

2 and be able to start this trial.

3 THE COURT: That is Mr. Kassner's problem,
4 not mine. If he had an undisclosed intention to be
5 trial counsel in this case, he knew it was starting today
6 and should have taken the appropriate steps to avoid being
7 tied up as he is now.

8 MR. WENDY: I don't believe it was undisclosed,
9 your Honor. Counsel has spoken to Mr. Kassner with regard
10 to this case.

11 MR. VISCARRONDO: The first time I learned
12 Mr. Kassner was at all involved in this case was on
13 Thursday when Mr. Wendy told me Mr. Kassner would try the
14 case with him.

15 THE COURT: The first I have learned of it
16 was Friday, when I was told an application would be made
17 for continuance while I was sitting in the Eastern District,
18 and I relayed the message back that a continuance would
19 not be granted, and if counsel were actually unprepared
20 to proceed, there would be fines levied under the authority
21 of the Sutter case, and that is where we stand.

22 Do you want to go ahead or not?

23 MR. WENDY: No, your Honor, I choose not to
24 go ahead.

25 THE COURT: You are aware this fine will be

Transcript, December 13, 1976.

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assessed against you personally as attorney of record.

MR. WENDY: If that is -- I don't believe that \$500 is worth a man's time in jail or a man's life, and if you feel that is proper and just --

THE COURT: No, sir, I believe it proper and just for attorneys to meet their obligations.

This trial was set down more than two months ago. Mr. Kassner runs around this court planning too many trials at too many times, and if he feels he can meet all these obligations, he is apparently incorrect.

MR. WENDY: We have satisfactorily met them for years, and I don't see why the Court should feel we can't meet our obligations.

THE COURT: The speedy criminal trial act mandates the federal trials within given time periods, and there is no such act in the state courts.

MR. WENDY: Your Honor has the option to extend that time without any prejudice to the trial, I believe.

MR. VISCARRONDO: That is not correct.

THE COURT: You are incorrect in that, Mr. Wendy, and I suggest you acquaint yourself with the federal laws.

Are you prepared to proceed?

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2 MR. WENDY: No, I am not, your Honor.

3 THE COURT: All right, be back here
4 tomorrow morning. We will go through the same
5 procedure again, and I intend to find you in contempt
6 and assess fines against you of \$500 for each day you are
7 unprepared to proceed.

8 MR. WENDY: Okay.

9 MR. VISCARRONDO: Your Honor, I have several
10 witnesses in this case that come from New Jersey and other
11 parts, and I am including one attorney. Would it be all
12 right with your Honor if I have these witnesses on call
13 so that they would come in the afternoon of the first day
14 we start?

15 THE COURT: No, I think I want you to have
16 at least enough witnesses to start things rolling in case
17 they are prepared to proceed tomorrow morning.

18 MR. VISCARRONDO: If jury selection goes
19 until twelve o'clock, would your Honor consider having
20 an early lunch and starting at one?

21 THE COURT: That I will do for you, allowing
22 jury selection and opening statements, and then take an
23 early recess for lunch and calling your first witness
24 immediately thereafter.

25 There is this other problem, which is that he

1 rb ja 9

2 wants you to make a statement for the record concerning
3 when you first learned about this witness and why you did
4 not know of him earlier.

5 MR. VISCARRONDO: I had received information
6 that the defendant was an associate of the narcotics
7 ring of which an individual named Frank Lucas was a
8 member. Frank Lucas was tried in this court in two
9 trials last fall.

10 I spoke with the Assistant United States
11 Attorney who tried Mr. Lucas in December, about a week
12 or two ago, and asked him if he had heard of the name
13 Herven Harris in the course of that trial. That attorney
14 and two other attorneys in the case said they had not.

15 Last Friday afternoon, I saw the attorney
16 again and mentioned to him that the defendant's nickname
17 and street name was Mex, and at that point the attorney,
18 Mr. Tom Fortuin, an assistant U. S. Attorney in my office,
19 said that he had in fact heard of Mex, although he did not
20 know him by his real name of Herven Harris, and thought
21 the informant in that case knew about Mex and could
22 testify as to narcotics related dealings with him.

23 He called the informant immediately and
24 determined that was the case, at which point I notified
25 Mr. Kassner that this witness would be called by the

1 rb ja 10

2 Government.

3 MR. WENDY: Your Honor, if I may ask,
4 then, when all of this was photostated, if this was late
5 Friday afternoon, when we were called. I would like the
6 Court to find that out.

7 The second thing I would like to find out,
8 your Honor, is why everything except the statement
9 pertaining to Mr. Harris is available to me and that he
10 said he would get to me at some future date.

11 MR. VISCARRONDO: All this material is
12 the 3500 material, and the testimony of this witness
13 at that Lucas trial. That was readily available. I told
14 Mr. Kassner if he wanted to pick up the material on
15 Saturday morning, it would be available to him.

16 Most of the material was xeroxed already. The
17 only thing that wasn't xeroxed was the trial transcript
18 of his testimony, and if Mr. Kassner wanted to pick it
19 up Saturday, the agents would have been here all Friday
20 night xeroxing.

21 Since he didn't pick it up, they xeroxed it
22 over the weekend.

23 The one statement that exists which doesn't
24 relate to this defendant is not in the possession of the
25 U. S. Attorney's office at this time because it did not

1 rb ja 11 Transcript, December 13, 1976. 11

2 relate to this trial. The agent who knows this witness
3 and has the statement is supposed to deliver it to us
4 today, at which time we will give it to defense counsel
5 immediately.

6 THE COURT: When do you expect this witness
7 will go on the stand, the first day of trial?

8 MR. VISCARRONDO: The second day of trial.

9 THE COURT: So they will have a minimum
10 of one or two days to examine this statement, which is
11 how long?

12 MR. VISCARRONDO: Very short, only two pages,
13 your Honor.

14 THE COURT: All right, ten o'clock tomorrow
15 morning.

16 MR. VISCARRONDO: There is one other matter
17 want to put on the record, your Honor.

18 Mr. Kassner indicated a desire to start this
19 trial next Monday, December 20th.

20 THE COURT: Impossible. I have a
21 class action starting next Monday at ten o'clock.

22 MR. VISCARRONDO: I want to state the
23 Government's extreme opposition to starting the trial
24 on that date, since it is Christmas week, and that Friday
25 is a court holiday.

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2 THE COURT: It is not going to be adjourned
3 past anything. I have a class action starting Monday
4 of some consequence to the state and to the litigants
5 involved, and this action is going to commence as soon
6 as possible.

7 MR. VISCARRONDO: Thank you.

8 THE COURT: We stand adjourned.

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1 gtjl Transcript of Proceeding, December 14
and 15, 1976.

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2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----x
5 UNITED STATES OF AMERICA :
6 vs :
7 HERVIN M. HARRIS, :
8 Defendant. :
9 -----x

76 Cr. 602

10 December 14, 1976
11 10 a.m.

12 B E F O R E:

13 HON. GERARD L. GOETTELS,

14 District Judge

15
16 APPEARANCES:

17 ROBERT B. FISKE, JR., ESQ.
United States Attorney for the
18 Southern District of New York
BY: PAUL VISCARRONDO, ESQ.
19 Assistant United States Attorney

20 KASSNER, DETSKY & WENDY, ESQS.
Attorneys for Defendant
21 BY: HOWARD WENDY, ESQ.,
of Counsel

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2 MR. WENDY: Your Honor--

3 THE CLERK: United States of America versus
4 Hervin M. Harris.

5 Is the government ready?

6 MR. VISCARRONDO: The government is ready.

7 THE CLERK: Defendant?

8 MR. WENDY: Not ready. I would like to make
9 an application to the Court at this time.

10 Since the Court mentioned to me the Sutter case
11 yesterday, I had an opportunity to read it and look at it and
12 I believe that our case is quite distinguishable from that,
13 and I believe or I would hope on reconsideration the Court
14 will change its mind and grant an adjournment.

15 I think the facts in the Sutter case were that
16 he took a case just about three weeks before he was scheduled
17 to start the trial.

18 In the instant case, the one that Mr. Kassner
19 is engaged in was accepted by our office about a year and a
20 half ago. Due to the district attorney, it was put off,
21 and through no fault of ours is Mr. Kassner engaged at this
22 time.

23 That is the first thing.

24 The second thing, on looking on Rule 3500, right
25 in the Rule, your Honor--and if you like I will show it to you--

Transcript, December 14, 1976.

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it grants the Court discretion to give a recess when material is given.

Yesterday morning I was furnished 2500 or 3000 pages of material to look at, and I don't feel that it was right of the Court not to grant me a reasonable amount of time to look at this material.

THE COURT: The witness has not appeared as yet and won't appear for a couple of days.

MR. WENDY: Well, your Honor, it is really-- I don't know what is in the material. The question is, this is not a question of statements.

There was a vast bulk of material there that I had no idea what was in it, and I think that I should have been offered an opportunity to look at that material.

THE COURT: If you read the Rule, it specifies that after the witness has been called, you will be given these materials, and then you can be given a recess to digest them.

I know of no requirement that a party be given a continuance of a trial before the trial in order to review 3500 material in advance of trial.

Do you agree with that, Mr. Viscarrondo?

MR. VISCARRONDO: I certainly do, your Honor. And as I said yesterday, we would dispute that this material

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2 is even 3500 material, because, to the best of my knowledge,
3 it does not deal with the witness' direct testimony, what we
4 anticipated it to be, but we are giving it to defense counsel
5 to make whatever use of it they wish.

6 THE COURT: I understand.

7 Anything further, Mr. Wendy?

8 MR. WENDY: No, your Honor.

9 THE COURT: The distinctions between this case,
10 and the Sutter case, by and large, run against you.

11 In the Sutter case, it was the attorney of
12 record who was on trial. In this case it is not the named
13 attorney of record, but a member of the firm who wishes to
14 partake in the trial who is on trail on a case which you tell
15 me is proceeding at the rate of three hours a day.

16 MR. WENDY: Your Honor, may I speak?

17 THE COURT: Yes.

18 MR. WENDY: Okay.

19 There are two things that I would like to clear
20 up, and I apologize to the Court. The Court has pointed out
21 that I am the attorney of record. I don't know how that
22 came about, but the firm should certainly be the one, and I
23 was never intended to be the attorney of record, your Honor.

24 THE COURT: Do you want to see the notice of
25 appearance?

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2 MR. WENDY: I would like to, if I may. AND
3 If I signed it incorrectly--

4 THE COURT: Yes (handing).

5 MR. WENDY: Your Honor, if I did, I signed it
6 inadvertently in that way, and it was meant to be Kassner
7 and Detsky and I was just by the firm. It was never--

8 THE COURT: Even if it had been the firm, you
9 cannot come in on the day of trial and say the particular
10 member of the firm whom we have now decided to try this case
11 is unavailable. It is not done.

12 MR. WENDY: No, your Honor, there is no
13 question, you know, that the Court has a discretion to do, you
14 know, what the Court has done.

15 There is some question in my mind, but what
16 I am saying is there is not the pressure of time. It is not
17 a question of one day, and we did not ask for a long con-
18 tinuance.

19 THE COURT: How long are you asking for?

20 MR. WENDY: We asked until the end of this week,
21 your Honor. We will be ready to start on Monday.

22 THE COURT: As I have explained to you, the
23 government has a strong objection to trying the case during
24 the Christmas week, and it is a common ploy of defense counsel
25 to attempt to push criminal trials back to Christmas week.

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However, that is not the deciding factor. The deciding factor is that I have an important class action involving the constitutionality of certain New York State provisions as to which there is a great public interest involved which has been scheduled for an extended period of time for next week, and your trial cannot go back to next week.

MR. WENDY: Your Honor, in that case, I mean, it was not--we did not wish to ask for a continuance further than that, but I would certainly have no objection to the week after nor would Mr. Kassner or any member of the firm. He would hold himself available.

THE COURT: I believe the U.S. Attorney would also object to trying the case during the week between Christmas and New Years for the same reason.

MR. WENDY: How about the week after New Years, your Honor.

THE COURT: The week after New Years I have scheduled virtually the oldest trial pending in this court and one as to which there have been four previous trial dates set, each of which has been adjourned because of impossible pressing problems of counsel, and they have been told that that case goes to trial the day after the New Years weekend or it gets dismissed.

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We cannot keep adjusting court calendars to fit the overburdened calendars of members of firms who wish to be of counsel on trials. It cannot be done, not and meet the speedy criminal trial deadline, which on this case runs immediately after the New Years weekend.

MR. WENDY: Your Honor, may I also point out that this case has never been adjourned before.

THE COURT: I am aware of that. We gave you plenty of lead time. We asked you when you wanted it tried. We set the trial date at your convenience and months in advance.

MR. WENDY: Well, your Honor, it was not exactly quite that way, but it may have been slightly at the government's convenience, because they picked the date.

The second thinkg, your Honor--

THE COURT: I don't recall the government picking the date.

MR. WENDY: Yes, yes, I believe they did. And I don't know if Mr. Viscarrondo is aware of it, because Mr. Epstein was here and chose the date. But that is the fact.

The next thing is that this case was originally scheduled for ten days court time. In an effort to--

THE COURT: Never. Never scheduled for ten days court time.

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2 There were discussion that the case could
3 run as long as ten days unless certain matters were stipulated
4 to.

5 MR. WENDY: That is correct, your Honor.

6 THE COURT: But it became apparent fairly early
7 that those matters would be stipulated to, and when I set this
8 matter down for trial and then put behind it this class action,
9 I knew that this was a one week trial.

10 MR. WENDY: Well, nobody--well, I was not aware
11 of it until just last week, your Honor, when I agreed with
12 the U.S. Attorney that I would stipulate to certain materials
13 that it would be any less than that.

14 Now, I don't know how the Court became aware
15 of that before I agreed with Mr. Viscarrondo, unless the U.S.
16 Attorney's office had some conversation with the Court, you
17 know, without my knowledge.

18 THE COURT: Not that I am aware of, but I have
19 received copies of all the communications back and forth
20 between you and the U. S. Attorney.

21 MR. WENDY: Then the Court will note that it is
22 only this very last week that there was any agreement made.

23 THE COURT: There was never any implicit
24 representation that you could back this case up into Christmas
25 week at any time by anybody under any circumstances, and it is

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2 not going to happen.

3 MR. WENDY: Your Honor, first of all, I really
4 wish to impress the Court that I did not choose the December
5 13th date, and I was here, that the U. S. Attorney, Mr.
6 Epstein, chose the December 13th date and that I had no
7 intention of backing it up in the Christmas week and that is
8 not our intention.

9 THE COURT: They did pick the December 13th
10 week. They have been ready to go since yesterday, December
11 13th.

12 MR. WENDY: Your Honor, the fact is, look, it
13 is not my firm's nor my intention to do this trial during
14 the Christmas week, and since the Speedy Trial Act will not
15 make it necessary to make this to be tried on January the
16 1st or January the 8th or January 15th, I don't see why we
17 cannot try--unless they have some objection to two weeks
18 after New Years.

19 Now, I have--

20 THE COURT: I think your interpretation of
21 the Speedy Trial Rule may differ from that of the Court of
22 Appeals.

23 MR. WENDY: Well, I hope not, your Honor,
24 because they are generally right and I am wrong.

25 However, I did have an opportunity to look at

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2 the Speedy Trial Act, too.

3 This case does not have to be tried before--
4 without any question--before January 27th.

5 THE COURT: That is not the date the U.S.
6 Attorney's office has figured out.

7 MR. WENDY: What is the date?

8 THE COURT: They have it listed as time
9 expiring on January 5th or 6th--the 4th, even.

10 MR. VISCARRONDO: I believe by my count it is
11 Janaury 3rd, because it is 180 days from the date of
12 arraignment of July 8th.

13 I will just point out, your Honor, that the
14 government filed a Notice of Readiness in this case on
15 August 17, 1976.

16 While I was not present at the pretrial confer-
17 ence at which this trial was set--

18 THE COURT: It is starting to come back to me
19 now. I do remember some discussions on this. Mr. Wendy kept
20 saying he had no idea what the case was about and he did not
21 know how he was going to prepare his defense and he had not
22 been able to talk to his client about it and we had two or
23 three pretrial conferences that went along like that with the
24 most amazing statements of total lack of knowledge of what
25 the case was about that I have ever encountered from defense

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2 counsel.

3 We had a pretrial--the case was first called
4 on July 8th, there was a pretrial conference on the 10th,
5 another one--excuse me, August 16th, another one on August
6 16th, another one scheduled for August 30th, which was
7 adjourned to either September 1st or 7th, I can't read the
8 number.

9 Then on September 21st Mr. Wendy came in and
10 said he still did not know what the case was about and he had
11 not made his motions, but he wanted more time to make motions,
12 this being almost three months after the indictment was filed.

13 Then finally we set another conference for
14 October 7th, and then still another conference for October
15 12th, and finally at that point, although Mr. Wendy was still
16 maintaining his options to debate certain records that had
17 not been shown to him, we had to set a trial date and we set
18 it for December 13th.

19 One of the sorriest series of postponements of
20 the ability to set a trial date I have ever encountered.

21 MR. VISCARRONDO: I would also like to state
22 that Mr. Epstein has informed me that he never ever understood
23 that Mr. Kassner was in any way involved in this case, and I
24 never understood that until December 9th.

25 THE COURT: Nor did I. This was particularly

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2 clear to me, because I had another case in which Mr. Kassner
3 was involved where he was being unavailable at unpropitious
4 times, and if I had known he was also involved in this case I
5 would have lowered the boom on him.

6 That other case, I might say, finally worked
7 itself out all right and got resolved.

8 I understand some papers have been filed in
9 the Court of Appeals. Is that correct?

10 MR. WENDY: Well, that is correct, yes, your
11 Honor.

12 THE COURT: All right. I am rather happy to
13 hear that. Since the Court of Appeals lays down the Speedy
14 Trial rules, I think it is only fitting that they be called
15 upon to determine the kind of difficulties that can arise in
16 enforcing their rules.

17 But I would like to see the papers that have
18 been filed.

19 MR. WENDY: This is a copy for your Honor.
20 (Hanging.)

21 MR. VISVARRONDO: Your Honor, the Court of
22 Appeals has not yet agreed to receives the government's
23 affidavit. But here is a copy of the affidavit that we do
24 intend to file if they will accept it. (Hanging.)

25 THE COURT: This is going to take me about ten,

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2 or fifteen minutes for me to read through these papers.

3 We will take a recess until I read them.

4 (Recess.)

5 THE COURT: I have read the papers filed in
6 the Court of Appeals. Let me return your copies to you
7 right now.

8 MR. WENDY: Your Honor, that is your copy.

9 THE COURT: This is my copy?

10 MR. WENDY: I believe it is required that we
11 serve a copy upon you.

12 THE COURT: There is nothing in the papers that
13 changes my opinion in the slightest.

14 However, there are a couple of errors in the
15 papers that I will call to your attention right now, Mr.
16 Wendy, so that you will not make the error in the future.

17 MR. WENDY: Yes, your Honor.

18 THE COURT: The papers imply that Mr. Kassner
19 is being threatened with contempt because he is not in two
20 courts at once.

21 It is not Mr. Kassner who is in contempt, Mr.
22 Wendy, it is you who are in contempt? Moreover, it says with
23 respect to the 3500 materials, I suggested to you that you
24 could read them during jury selection.

25 I never made such a suggestion. I told you that

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2 it would be a couple of days before the witness appeared
3 and you had all that time in which to review the papers.

4 MR. VISCARRONDO: Your Honor, I would just like
5 to state that that is exactly my memory of what happened,
6 also. The reason I did not put that in the affidavit was
7 that the transcript was not yet available and I wanted to
8 wait to get it.

9 THE COURT: Yes.

10 Are you admitted to the bar of this Court,
11 Mr. Wendy?

12 MR. WENDY: Yes, your Honor.

13 THE COURT: If you are not qualified to try a
14 case, why are you admitted to the bar of this Court?

15 MR. WENDY: Well, your Honor, there are
16 qualifications and there are qualifications, your Honor, and
17 I am qualified in the eyes of the Court. It is just that I
18 feel that a defendant, when he faces a possible criminal
19 trial, should have somebody with a greater amount of experience
20 than I have, your Honor.

21 I don't--I am a lawyer and I am admitted in
22 New York State and there is no question that I would not be
23 violating the law to try this case. However, this is not
24 a civil case and not one that I feel I should cut my teeth
25 on, your Honor.

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2 THE COURT: You feel you are qualified to
3 try a civil case but not a criminal case?

4 MR. WENDY: Well, I think that the risks are
5 quite--it is not a question of feel that I am qualified, your
6 Honor. If you were just to measure my own feelings, that
7 would be a question of my own ego, but I just feel that there
8 is too much at stake in this case, that it is a--

9 THE COURT: Let me suggest to you, Mr. Wendy,
10 in light of the Second Circuit's tremendous interest in the
11 competency of the attorneys appearing before it that by
12 filing a notice of appearance in this case, participating
13 in the pretrial aspects of the case and then representing
14 yourself as being unqualified to try the case, you place your
15 membership in this bar in serious jeopardy.

16 MR. WENDY: Your Honor, it was not my intent
17 ever to place my membership in this bar in jeopardy and it
18 was not my intent ever to do anything to make the Court feel
19 that way. I just feel that this is a case of a very serious
20 nature, it is a felony crime.

21 Your Honor, anybody coming out of law school
22 and passing the bar supposedly can try a felony crime.

23 THE COURT: I would not agree with that, I
24 don't think the Second Circuit agrees with that.

25 MR. WENDY: Well, you don't feel if they are

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2 admitted to this Court they cannot try a felony crime?

3 THE COURT: I don't think anyone should apply
4 for admission in this Court unless he feels that he is
5 competent to litigate cases. Graduation from law school
6 and passing the bar does not necessarily so equip you. By
7 applying for admission to the bar of this Court, which is
8 not a prerequisite to the practice of law but indicates that
9 you wish to try cases, you are indicating that you are both
10 professionally able to try cases and are familiar with the
11 Federal Rules and the Federal standards of procedure.

12 MR. WENDY: Your Honor, I have a great desire
13 to try cases in this Court and before this bar, and it is
14 precisely because of this desire and my great respect for
15 this Court that I wanted to assist Mr. Kassner and what I
16 consider capable lawyers so that I may enhance my knowledge
17 any try the cases.

18 You know, it is not fair for me to judge
19 whether or not I am capable to try it. I have all the
20 qualifications that are necessary, your Honor. I believe
21 that. I wanted some practical experience of sitting with
22 an able trial lawyer. And, your Honor, it is costing me
23 a rather large amount of money to get this further education
24 that I feel is necessary. But, your Honor, please, I don't
25 want for one minute--I value, you know, the right to practice

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2 here too much to place it in jeopardy, your Honor.

3 THE COURT: Are you prepared to proceed to
4 trail at this time?

5 MR. WENDY: No, your Honor. I feel that I--
6 I feel, without any further disrespect to the Court, I feel
7 that I would like--if the Court will not change its mind
8 on my application, I would like the opportunity for the
9 Second Circuit to hear my case.

10 THE COURT: Well, obviously if they are going
11 to hear it, we all have to defer to its directions. I take
12 it at the present time, however, there still remains a
13 question as to whether they will entertain your application.

14 MR. WENDY: I will inform the Court immediately
15 upon--

16 THE COURT: But until I am advised that they have
17 the matter sub judice--and perhaps even then--I think I
18 retain jurisdiction here for trial setting purposes, and as
19 far as I am concerned--I take it that rather than being com-
20 pelled to proceed at this time, you would prefer being held
21 in contempt for being unable to proceed at this time?

22 MR. WENDY: Your Honor, that is placing
23 me on the horns of a dilemma.

24 THE COURT: It certainly does. But you have
25 the choice. You can proceed at this time or I am going to
find you in contempt and fine you another \$500.

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2 Are you prepared to proceed?

3 MR. WENDY: No, your Honor.

4 THE COURT: All right. So far as I am concerned,
5 you are in contempt and I am fining you an additional \$500.

6 Now, I will say in rereading the Sutter case,
7 there are implications that if you are proceeding under the
8 contempt rules, and it may be that is the only remedy in this
9 district since we don't have a rule examiner available to 8(B)
10 I think it is in the Eastern District, that I should properly
11 refer the question of contempt to another judge.

12 However, that aspect of it is something we can
13 think about later on. So far as I am concerned, you are in
14 contempt and should be fined and the fine should be \$500 a
15 day.

16 Mr. Viscarrondo, what do you believe my powers
17 are to direct this case to commence tomorrow morning, assuming
18 everything is in the exact same posture it is in right now,
19 which is to say the Second Circuit has not taken any action,
20 Mr. Wendy indicates he is not prepared to proceed and will not
21 be until Mr. Kassner is ready, which I now gather is a week
22 or more away from today?

23 MR. WENDY: No, your Honor.

24 THE COURT: As I read Mr. Kassner's affidavit--
25 let me look at it again--he indicated at the very slow pace

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2 at which they were proceeding in the state court, just sitting
3 a few hours a day, that it could be a week or more before
4 he was finished.

5 Now, let me see if I can find it.

6 MR. WENDY: It is on page 6, your Honor. I
7 believe he says that, "I will need at least two weeks to
8 complete the Hendy trial."

9 THE COURT: Yes. You are agreeing with me now?

10 MR. WENDY: Yes. I reread Mr. Kassner's
11 affidavit.

12 THE COURT: All right. So we are not really
13 talking about an adjournment until next week in any event.

14 MR. WENDY: Well, your Honor, I don't know. The
15 last conversation I had with Mr. Kassher, which was yesterday,
16 it was his intention or what he said to me was that he
17 thought he would be able to try it if the case started on
18 Monday.

19 Now, I don't know how this inconsistency arose,
20 but that was my best belief. But, your Honor, if I may just
21 say that I think, number one, that the papers were served
22 on the U.S. Court of Appeals this morning and--

23 THE COURT: Yes. I feel that I have to wait
24 at least 24 hours to see what they are going to do.

25 MR. WENDY: That is what I was going to say.

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2 THE COURT: But as far as I am concerned, you
3 are in contempt unless they give you relief. I don't think
4 the making of the motion relieves the contempt.

5 MR. WENDY: No, but what I am saying to you is
6 this, your Honor: if the Court of Appeals does not grant the
7 review that I request, and I requested a stay of both the
8 fine and the trial, if the Court of Appeals does not, your
9 Honor, at that point I would like the opportunity to come
10 before this court and again--

11 THE COURT: You then have the opportunity
12 because you are coming back tomorrow morning, and every
13 morning until the Court of Appeals takes some action.

14 MR. WENDY: Okay, your Honor.

15 THE COURT: But my question to Mr. Viscarronda
16 is, assuming that the Second Circuit takes no action and
17 gives us no further guidance and assuming we are where
18 we are now tomorrow morning, do I have the power to direct
19 the trial to commence despite Mr. Wendy's stated inability
20 to represent the defendant?

21 MR. VISCARRONDO: Your Honor, it would seem to
22 me that if Mr. Wendy refuses to represent the defendant, the
23 defendant at that point it without counsel. I believe that
24 what your Honor could do at that point is to direct the
25 defendant to obtain other counsel and give him a reasonable--

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2 THE COURT: If I do that, obviously any counsel
3 coming in on a tax case can certainly require a few days, if
4 not a few weeks, to prepare himself, so, in effect, by doing
5 that, they achieve what they are seeking to achieve.

6 MR. VISCARRONDO: Clearly, your Honor.

7 THE COURT: You believe, however, that I cannot
8 compel the attorney of record, even though he is admitted
9 to the bar of this court, to commence a trial without running
10 a serious risk that upon his stated inability to represent the
11 defendant and despite the fact he is retained and not appointed
12 counsel, that the Court might ultimately find that any con-
13 viction would have to be set aside because of inadequate
14 representation?

15 MR. VISCARRONDO: Well, your Honor, despite
16 what Mr. Wendy has said, I have not seen anything at this
17 point that would make me believe that Mr. Wendy is not, in
18 fact, able to provide adequate representation.

19 THE COURT: This is unfortunately a situation
20 where none of us would know until it is too late.

21 MR. VISCARRONDO: That is correct. All that I
22 can say is that as I understand your Honor's ruling now,
23 you are directing Mr. Wendy to proceed with the trial and
24 to represent his client.

25 THE COURT: Yes. And he is telling me he

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2 cannot do it and is not going to do it and I am, therefore,
3 finding him in contempt and that is where we presently stand.

4 The question is, can I direct the case to go
5 forward at the peril of Mr. Wendy just sitting there and
6 doing nothing or doing it so ineptly as to prove his point.

7 MR. VISCARRONDO: I suppose that your Honor can.
8 I do not know how prudent that would be. I think it would
9 cause more problems.

10 THE COURT: I think your position at present
11 is probably well taken. I would suggest that you take some
12 time today considering what to do. I am sure this is not a
13 unique circumstance and, indeed, I suspect that it is becoming
14 a more and more common situation under the Speedy Criminal
15 Trial Rules.

16 If we were dealing with a 90 day case of an
17 incarcerated prisoner and if the 90 days was expiring, let
18 us say, today, I think that the defendant, on his own, could
19 arise tomorrow and demand to be released from prison on
20 grounds that his counsel was not unavailable, just untalented,
21 and since none of the 90 day rule exceptions would be appli-
22 cable, he would be entitled to be released.

23 Consequently, there must be some way of handling
24 this kind of situation.

25 MR. VISCARRONDO: I will consider it today.

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THE COURT: Look into it.

You ought to look into it, also, Mr. Wendy.

MR. WENDY: I certainly will, your Honor.

I would like to point out for the record and for the Court's benefit, Mr. Kassner was retained by the defendant in this case, Max Harris. Howard Wendy was not retained--

THE COURT: Do you have a formal written retainer?

MR. WENDY: I have explained to this Court-- I don't know whether he has a written retainer with the firm, your Honor. I am a member of the firm. Now, I have explained that to this Court on a number of occasions, and the Court refuses to hear me.

THE COURT: You are not only a member of the firm, you are the attorney who signed the notice of appearance. You are the attorney who appeared at every pretrial conference. Until a day or two back, working day or two back, nobody knew Mr. Kassner was going to have anything to do with this case.

Now, there are other trial attorneys in your firm beside Mr. Kassner.

MR. WENDY: Just Mr. Detsky, your Honor, I believe, and Mr. Detsky is engaged at the time, also. There

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2 is nobody to try the case.

3 Would your Honor suggest that I take this as my
4 first criminal trial?

5 If your Honor says to me on the basis of that
6 that I will be fined \$500, I will be incarcerated and I will
7 no longer be allowed to practice before the bar of the
8 Southern District, your Honor is forcing me under duress
9 to take the case and I will, as your Honor directs, sit
10 there mutely nd allow you to run the case.

11 THE COURT: A, I am waiting 24 hours to see if
12 we get any directions from the Court of Appeals and, B,
13 awaiting Mr. Viscarrondo's position in that regard until
14 tomorrow morning.

15 MR. WENDY: Fine. I would just like the Court
16 to understand that Howard Wendy was not retained in this
17 case, that Howard Wendy may have inadvertently signed that
18 paper Howard Wendy by Kassner and Detsky.

19 THE COURT: It does not even say that. It
20 just lists your firm's name, Kassner and Detsky.

21 MR. WENDY: There was never any question in my
22 mind in filling out that paper, and I would like to look at
23 other papers to see if they are filled out in that manner,
24 not in this particular case.

25 THE COURT: There are several papers in here

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2 signed Howard Wendy.

3 MR. WENDY: Your Honor, I am glad that I am con-
4 sistent, because when I worked with the government they told
5 me consistency is important.

6 THE COURT: You filed a notice of appearance on
7 July 9th; you filed another notice of appearance on July
8 19th, each saying that you appeared for the defendant Hervin
9 Harris.

10 MR. WENDY: Your Honor, none of the written
11 documents were on my own stationery; it was never intended
12 that anyone but Kassner and Detsky would be, just as Epstein
13 was the U.S. Attorney who appeared all the time on this
14 particular case and Mr. Viscarrondo is the one who is going
15 to try it.

16 THE COURT: I would have no objection if you
17 substituted someone else for your firm if he were ready to
18 go on the 13th.

19 MR. WENDY: Well, your Honor, what we tried
20 to point out to this Court is that it was not through any
21 fault of ours, is that the man did not take the case as he
22 did in the Sutter case and say, "Well, this is more important
23 than a federal court case."

24 The man was in the middle of a trial, had a
25 mistrial declared and--

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2 THE COURT: The mistrial was declared back in
3 the process of jury selection. It did not waste more than a
4 half a day or a day. What is slowing that case down is the
5 fact that the judge is in the motion part and he is sitting
6 only half a day.

7 Now, assuming Mr. Kassner were to be trail
8 counsel, something that was an unexpressed intention on your
9 part, you could have made it quite clear that he had an
10 obligation in the Federal Court which was set down long before
11 the trial date in that New York Supreme Court case was set down
12 and that it was an unavoidable obligation and that he knows
13 under the Federal Speedy Trial Rules he would be expected
14 to be there, and at that point the judge might have advised
15 him, "Well, you know, this case is going to run two or three
16 times as long as you might think because I have something
17 else to do."

18 But I don't think Mr. Kassner bothered with
19 that.

20 I also point out to you that the notice of
21 ready for trial filed on August 17, 1976, is directed to
22 Howard Wendy, Esquire.

23 I have heard enough.

24 MR. WENDY: Your Honor, just one last thing,
25 and that is I think it should be noted that the fact that

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2 the U.S. Attorney does not want to try it because of the
3 advent of Christmas week and the Court's note that this is
4 a usual custom of trial tactics of defense counsel to push this
5 off to Christmas week should be taken into consideration in
6 the Court placing such a heavy burden as \$500 a day fine and
7 the imposition of a counsel who has never tried a criminal
8 case on this case and you have such great haste and speed to
9 pursue this case in connection with the fact that the U.S.
10 Attorney does not want to try it during the Christmas
11 season.

12 THE COURT: Mr. Wendy, I have told you at least
13 three times, but I will say it again. While I sympathize
14 with the government's position and while they may have a
15 point in that regard, it is not what led to my rulings and
16 does not lead to my rulings. It is the fact that I have plan-
17 ned other matters for next week which cannot be put off and
18 I have nothing else planned for this week except this trial
19 and you are wasting my time, my clerk's time, my law clerk's
20 time, the Court's time, the witnesses' time and the jurors'
21 time.

22 MR. WENDY: Your Honor, could this Court have
23 not have moved the other trial up. Aren't they on the
24 ready calendar?

25 THE COURT: Oh, no, they are not. They are on

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a date certain for next Monday and you will be interested to know the attorney in that case has also moved to be relieved and his motion is going to be denied, and that case is going to go ahead as scheduled.

I got nothing but attorneys moving to be released on the eve of trial lately.

MR. WENDY: I don't want to be relieved, your Honor.

THE COURT: I know.

MR. WENDY: I want to be a part of this trial, very much.

THE COURT: Yes. You don't want to be the attorney of record, which is what you have been since the start.

All right, see you at ten o'clock tomorrow morning, unless the Second Circuit directs to the contrary in the interim.

MR. VISCARRONDO: Thank you, your Honor.

MR. WENDY: Thank you, your Honor.

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2 United States of America

3 v.

4 Hervin M. Harris

5 New York, New York
6 December 15, 1976 - 10 a.m.

7 (Trial resumed.)

8 THE COURT: Good morning, gentlemen.

9 THE CLERK: United States of America versus
10 Hervin M. Harris.

11 Is the government ready?

12 MR. VISCARRONDO: The government is ready.

13 THE CLERK: Is the defendant ready?

14 MR. WENDY: No, your Honor.

15 THE COURT: Has there been any change in the
16 situation from yesterday?

17 MR. WENDY: No, your Honor.

18 With regard to my presence or the Court of
19 Appeals?

20 THE COURT: Both.

21 MR. WENDY: Well, I called the Court of Appeals
22 this morning at approximately 9:20 and as of yet there was
23 no decision.

24 I don't know in between that time and this time
25 as to whether anything has come about.

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2 THE COURT: As of 9:20, however, there has

3 still--

4 MR. WENDY: No.

5 THE COURT: The matter is still sub judice
6 before the Court of Appeals?

7 MR. WENDY: Yes.

8 THE COURT: Have they accepted the government's
9 opposing papers, Mr. Viscarrondo?

10 MR. VISCARRONDO: Yes, they have, your Honor.

11 THE COURT: I am now reading an affidavit which
12 I gather has been submitted to the Court of Appeals.

13 MR. WENDY: No, no, your Honor, it has not,
14 because I informed the Court, and I apologize, that I was
15 late and I did not want to waste the Court's time in going
16 up there.

17 THE COURT: I take it you are about to submit
18 it to the Court of Appeals?

19 MR. WENDY: Yes, your Honor, I am.

20 THE COURT: All right. I am reading it.

21 (Pause.)

22 THE COURT: Have you read this affidavit, Mr.
23 Viscarrondo?

24 MR. VISCARRONDO: Yes, I have, your Honor.

25 THE COURT: Since you are, in effect my lawyer

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2 before the Court of Appeals, I think you should bring to the
3 attention of the Court of Appeals the number of pretrial
4 conferenced had, all of which were attended by Mr. Wendy;
5 the inordinate amount of time taken before the discovery
6 aspects were disposed of, and the fact that the trial date
7 set was to everyone's knowledge the last possible trial
8 date before the holiday period which, in turn, ran out the
9 time under the Speedy Trial Rule.

10 MR. VISCARRONDO: Your Honor, on that point, I
11 would just like to state that I spoke with Mr. Epstein this
12 morning about the comment that Mr. Wendy made yesterday that
13 the trial date was chosen by the government. Mr. Epstein
14 says that that is outrageous, aht nothing of the sort happened;
15 that your Honor set the trial date with the agreement of
16 both counsel.

17 I ordered the transcript of that pretrial
18 conference.

19 THE COURT: Yes. That is my recollection.

20 Mr. Wendy indicated he needed more time to
21 prepare his case and we gave him as much time as we could and
22 still stay within the Speedy Trial Rules without running
23 into the holiday period.

24 MR. WENDY: Your Honor, may I be heard?

25 THE COURT: Yes.

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2 MR. WENDY: As far as that goes, the best
3 recollection that I have was that your Honor set the trial
4 date with the consent of both counsel, but it was at the
5 suggestion of Mr. Epstein. That is my best recollection.

6 THE COURT: I would doubt that very much.
7 I don't generally ask U.S. Attornies to suggest trial dates.
8 I think what it came down to was, I said to him--you indicated
9 that you needed as much time as possible, and I said to him,
10 "How much time can we give him? When must the case be tried
11 by?"

12 And Mr. Epstein said, in effect, the trial must
13 commence by January 2nd or January the 3rd.

14 I indicated that that was not a convenient time
15 for me, that I had other matters planned. Indeed, I know
16 I had other matters planned. I had the Clock tax case,
17 which is a major tax case, scheduled to run the entire month.
18 It happend a week or two back Mr. Clock entered a guilty plea,
19 but as of when we set this trial date, the Clock case was
20 scheduled.

21 And I believe then I indicated to Mr. Epstein
22 that it would, therefore, have to be before the holidays
23 and sometime about the middle of December, and I then
24 selected the December 13th date, as to which counsel for
25 all sides were agreeable and were well aware that that was a

1 firm trial date and one that was not going to be changed.

2
3 MR. WENDY: Your Honor, I wish--I wish to
4 impress the Court as best that I can that these are not,
5 not trial tactics, that this is something that--occurred
6 that is beyond my control and beyond my means, that I feel
7 very strongly about it and I feel, you know, that there is far
8 too much at stake to subject Mr. Harris to this. I am
9 a little, you know--I don't know the right word--that you feel
10 it is an adversary proceeding. I don't feel it is an adversary
11 proceeding.

12 At the moment, I happen to be the party, you
13 know, who is being held in contempt and being fined \$500
14 per day, and I take this very seriously, because I take being
15 a lawyer very seriously. But I still feel that the real
16 party in interest here is Mr. Herwin Harris, and if I felt
17 for one minute that I could do a better job than Mr.
18 Kassner, there would be no question in my mind that I would
19 try this case immediately.

20 I feel that combined, Mr. Kassner with my
21 assistance, perhaps would give Mr. Harris, you know, the
22 counsel that he is entitled to. I don't--I don't take this
23 as a joke and, unfortunately, I am not experienced enough
24 to say that this is a trial tactic. So I want the Court to
25 understand that no matter what the Court does or how it

1 gtjl Transcript, December 15, 1976.

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2 feels, it was never my intention to do that, it was never my
3 intention to try this case, and if anything, it was an em-
4 barrassing admission at this time to tell my client that I am
5 inexperienced, that he is a client of the firm. But I felt
6 that that was the lesser of two evils.

7 THE COURT: There are, in my opinion, certain
8 unavoidable conflicts between the demands of the Speedy Trial
9 Act and the constitutional right of a defendant to counsel
10 of his own choice and adequate representation. However,
11 I do not see this case as presenting such an issue.

12 The problem in this case was twofold, or maybe
13 it was threefold. The first problem is that you obtained
14 admission to practice before this Court without having
15 adequate qualifications to proceed as a trial attorney on your
16 own before this Court.

17 Chief Judge Kaufman has suggested that certain
18 standards be set up before admission, such as having assisted
19 at several trials, other things, which would avoid situations
20 like this. I realize that the present standards of admission
21 do not require you to establish your ability to perform as a
22 trial lawyer and, therefore, technically you can obtain
23 admission to this bar even though not qualified as a
24 litigator. But that is our first area of problem.

25 I agree that it is not unique to you and it

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2 perhaps it is not a problem for which you are personally
3 responsible, but it is one as to which the Court is going
4 to have to address itself sooner or later.

5 The second problem, however, is distinctly
6 of your making. You listed yourself as counsel of record
7 throughout and never, until the day before the trial, or
8 two days at most, indicated that you were not going to be
9 trial counsel, and that is completely inexcusable.

10 It may be, and I take your word for it, that
11 it was simply a lack of knowledge on your part, a lack of
12 experience and that you are not attempting to gain any
13 strategic advantage by it. However, your errors in this
14 regard have left the case with a vacant calendar for the
15 entire week, have imposed upon the government to call
16 witnesses, have created problems with jurors who are not
17 being utilized and courtrooms that are not being utilized, and
18 I believe that this problem and this problem alone warrants
19 the assessment of fines against you.

20 The third problem in this matter is that even
21 had you indicated at a very early date that Mr. Kassner
22 was to be counsel of record, Mr. Kassner should not have
23 allowed himself to become mousetrapped into a trial which is
24 proceeding at half pace.

25 The state courts are, unfortunately, very

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1 liesurely in getting their criminal calendars disposed of.
2 We, on the other hand, are confronted with a congressional
3 mandate that we try these cases within given periods of time,
4 as well as a rule set down by our Court of Appeals requiring
5 that we get these cases tried if at anything at somewhat more
6 than a mandatory posture, and finally we now have, although
7 I am not certain it has been published, a District Court
8 rule which in some respects is even more stringent than the
9 other two.
10

11 If Mr. Kassner had been denominated as
12 attorney of record from the start, there are judges in this
13 court who would have issued to the marshal mandates to have
14 him physically brought to this court to be present to this
15 trial could proceed. That has been done.

16 It creates a tremendous amount of friction be-
17 tween the state and federal courts. I obviously don't intend
18 to do it in this instance because I don't accept him as
19 counsel of record. He has not been listed as counsel of
20 record and, therefor, it is difficult to land on him.

21 But on the other hand, you are using his
22 absence as your excuse and I won't accept that. I am, there-
23 fore, again, finding you in contempt and fining you an
24 additional \$500.

25 However, I think we have reached the point where

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any further civil compulsion here out would be meaningless, because we have reached the point where, because of other commitments, I could not commence the trial even if you and Mr. Kassner were ready tomorrow.

Consequently, I do not intend to impose any further fines after today. I am carrying the case over sine die. I am, however, directing you--and I don't care whether you have Mr. Kassner or whoever you want assisting you, but you better have whatever you need ready every day after the first day of January, because you must be prepared to go forward on 24 hours notice and you will not have more than 24 hours notice in all likelihood.

I am still considering the possibility of referring the entire contempt question to another judge because of the Court of Appeals intermissions in the Sutter case.

I am going to reserve final decision on that until I see what the Court of Appeals does with your present mandamus application.

MR. WENDY: Thank you, your Honor.

I would just like to point out to the Court, again, that it was never my intention to, your know, to put over any fraud on this Court.

As far as the government having witnesses and

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2 being, you know, put in a position of bearing costs, at
3 the earliest opportunity I informed the government that we
4 would not be ready on Monday. Their first reaction was, "Okay."
5 Their second reaction was, no, they were going to oppose it.

6 This is what I was told.

7 THE COURT: Mr. Viscarrondo, did you ever or
8 anybody in your office, to your knowledge, ever indicate
9 that they were agreeable to an adjournment of this trial
10 date?

11 MR. VISCARRONDO: Your Honor, when Mr. Wendy's
12 secretary called me on Friday morning, I first told her that
13 we would probably take no position whatsoever. Then, upon
14 thinking about it for five minutes, I called her back while she
15 was on the phone with your secretary and told her to withhold
16 telling your secretary anything until I thought about it some
17 more and spoke to my superiors.

18 I did so, and I called your secretary and
19 told her the government objected to any adjournment.

20 MR. WENDY: Your Honor, what I am saying, is,
21 I am just recounting the facts that I did not intentionally
22 come in here and spring it as a surprise. I called Mr.
23 Viscarrondo on the Thursday before that Friday morning.

24 THE COURT: Mr. Wendy, I am willing to accept
25 your representation that you have created this problem out of

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2 sheet ignorance. That goes back to the question of whether
3 or not we should not have more stringent standards for
4 admission to the bar of this court.

5 MR. WENDY: In regard to that, I would just
6 like to take the Court's time for one minute. I agree fully
7 with what the Court has said and it is in trying to comply
8 with what the Court has just said that I feel, although I
9 am admitted to practice before this Court, I wanted the
10 opportunity to assist in a few criminal trials before taking
11 on a criminal trial on my own.

12 Judge, I did not want to say this yesterday and
13 I don't want to sound egotistical. I think I am a capable man
14 and I think that anything that I do I give my best effort to.
15 I just feel, as I said many times, that the man's freedom is at
16 stake here and I have never assisted anyone in a criminal
17 trial nor participated in a criminal trial and I felt I would
18 like this opportunity to do that a few times and then go out
19 and try it on my own.

20 THE COURT: On the other hand, I take it that
21 your area of substantive expertise is tax law.

22 MR. WENDY: That is correct, your Honor.

23 THE COURT: And this is a tax case.

24 MR. WENDY: That is correct, your Honor.

25 THE COURT: And I can tell you that there are

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2 many competent litigators in the general sense, criminal
3 defense lawyers, who cannot start to handle a tax case,
4 at least a complicated tax case, because of the intricacies
5 of the tax laws. But that is still another question.

In the final analysis, we come down to the fact
that this Court and the functioning of the Speedy Trial
8 Act and the local rules has been completely frustrated by
9 a situation entirely of the making of you and your firm, and
10 I can tell you that even if your motives are entirely pure,
11 if the courts continenced such situations, we are inviting
12 a complete abrogation of the Speedy Trial Rule and too many
13 and too easy opportunities for counsel to prevent criminal
14 trials from going ahead when scheduled.

15 MR. WENDY: Your Honor, there is just one last
16 word and that is in contempt, I always thought it was the
17 intent of the party, and that is what I tried to impress
18 upon the Court, that there is no intent here to be contemptuous
19 of the Court or its rulings.

20 THE COURT: You are certainly intentional in
21 your refusal to go ahead with the trial. That you may have
22 thought that Mr. Kassner would be available, and, therefore,
23 there would not be this problem I don't think takes you out of
24 the area of willfully frustrating the ability of the Court to
25 go ahead.

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2 But as I say, I will wait and see what the
3 Second Circuit says about the matter, and even if they say
4 nothing about the matter--well, if they don't give me any
5 guidance, I will then independently consider whether this
6 matter should be referred to another judge for the
7 consideration of the contempt aspects.

8 It may well be that there is a distinction be-
9 tween a civil contempt and a criminal contempt and it may
10 be you can find under the civil contempt aspect.

11 MR. WENDY: Yes, your Honor.

12 In any case, this is adjourned to January the
13 2nd and on 24 hour notice?

14 THE COURT: January 2nd happens to be a Sunday.

15 MR. WENDY: January the third?

16 THE COURT: But as of January 3rd, you should
17 be ready to go on 24 hours notice.

18 I will attempt to give more notice if I can,
19 but--

20 MR. WENDY: That means January the 4th I will
21 see that Mr. Kassner and I are available and at any time
22 thereafter.

23 THE COURT: You had best be.

24 I realize the government has problems of getting
25 its witnesses here on short notice.

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2 MR. VISCARRONDO: Your Honor, may I be heard
3 briefly?

4 We would ask that your Honor ask the defendant
5 to state on the record that he is unwilling to go forward
6 with Mr. Wendy representing him, and if he does make that
7 statement that your Honor make a finding under Section 8(A)
8 of Section 3161 of Title 18, the Speedy Trial Act, that a
9 continuance of the trial is in the interests of justice so
10 that this period would be excluded under the Speedy Trial
11 Act in computing the 180 days.

12 THE COURT: What you are worried about is the
13 very strong possibility that on January 4th, Mr. Harris
14 appears with a new attorney and moves to dismiss his
15 prosecution for lack of a speedy trial?

16 MR. VISCARRONDO; That is correct..

17 THE COURT: And washes his hands of any of the
18 errors of Messrs. Kassner, Detsky and Wendy.

19 Do you understand what we are talking about,
20 Mr. Wendy?

21 MR. WENDY: Yes, I do, your Honor. But I cannot
22 understand how the government or the Court can hold me in
23 contempt three days in a row, put it over till the last day,
24 you know, which is January 4th, when we are ready on Monday
25 or any date thereafter, as I state now.

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2 I have no objection to the defendant stating that
3 and I have no objection to anything else, but I come in
4 and ask for a four day or five day continuance and I really
5 felt threatened, Judge, every day that I have been coming
6 down here, not only by the fine, but under the fear, as I
7 thought you were going to say now, of being incarcerated,
8 your Honor.

9 THE COURT: What you are forgetting is the
10 reason I am ceasing the civil compulsion as of now and not
11 doing this tomorrow and the next day is that my own obligations
12 for other cases are such that I could not possibly complete
13 your case even if you came in tomorrow being ready.

14 Consequently, the best I can do with you is
15 hope for early January, and even that is still questionable.

16 So I do think I am compelled to ask Mr. Harris,
17 are you prepared to proceed at this time with Mr. Wendy as your
18 attorney?

19 MR. HARRIS: I didn't understand the question,
20 your Honor.

21 THE COURT: Are you prepared to proceed at
22 this time with Mr. Wendy as your attorney?

23 MR. HARRIS: No, your Honor.

24 THE COURT: Do you wish the matter continued
25 until Mr. Kassner is available and my calendar will permit

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2 the case to go forward?

3 MR. HARRIS: Yes, sir.

4 THE COURT: Well, I think the interests of
5 justice compel me to carry the matter over.

6 The economies of government cry to the contrary,
7 because we are wasting an awful lot of the government's
8 time and money, and by the government I don't mean the Justice
9 Department, but I mean the Court's time.

10 But as we discussed yesterday, I think if I
11 were to direct Mr. Wendy to try this case at this time,
12 despite his professed inability to do so, that any conviction
13 that might be obtained would be subject to collateral attack
14 on the grounds of the ineffective assistance of counsel.

15 MR. VISCARRONDO: I agree, your Honor, and that
16 is why I ask you to make that finding.

17 I would just like to state in response to Mr.
18 Wendy's statement that he cannot understand how the Act would
19 be violated if Mr. Kassner is ready to go to trial next
20 Monday, that Section 5(F)2 of the Southern District's plan
21 for prompt disposition of criminal cases promulgated under
22 the Speedy Trial Act states that, "Individual calendars
23 shall be managed so that it will be reasonably anticipated
24 that every criminal case set for trial will be reached
25 during the week of original setting. Neither a conflict in

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schedules of assistant United States attorneys or conflict in schedules of defendants' counsels will be grounds for a continuance or delayed setting, except under unusual circumstances, approved by the Court, and called to the Court's attention at the earliest practical time."

Clearly these rules and the Speedy Trial Act were not set up for the convenience of counsel, and I think that Mr. Wendy's comments are inappropriate.

THE COURT: No, they are not.

And moreover, I have pending before me at the present time another case in which a defendant is asking to have his conviction set aside because of the ineffective assistance of counsel, and that counsel was Mr. Kassner.

Now, the problem there is a little bit different. It has to do with the question of dual representation of two defendants where it is contended he should have only represented one. However, I am continually of a mind that Mr. Kassner is attempting to appear in too many courts and in too many matters and that the court system is being frustrated by it.

There is an argument made that the courts must adjust their calendars to meet the availability of particular busy individual attorneys who are quite popular and that since defendants have a constitutional right to choose counsel of their choice, it is a constitutional deprivation to force them on to trial with a different attorney.

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2 To my knowledge, there never has been a
3 definitive decision in this regard with respect to retained
4 counsel as opposed to assigned. Someday there will be.
5 But the fact that Mr Kassner may be available next Monday
6 does not mean that I am available next Monday or, for that
7 matter, that you are available next Monday.

8 Counsel in this case were told more than
9 two months ago that the case would start trial on December
10 13th. I kept that time open. I honored that date. The
11 government was ready. Mr. Kassner was not.

12 MR. WENDY: Your Honor, Mr. Kassner was retained
13 in the Hendy case well over a year ago. He was in the middle
14 of the trial and he could not--

15 THE COURT: It had not been set for trial until
16 well after this case had been set for trial.

17 MR. WENDY: I believe it was on the same basis
18 as the Court has just put me, that, "You had better be ready
19 on a 24 hour basis."

20 Now, what would the trial counsel do at that
21 time, after the Court says, "You hold this date available
22 and be ready at any time on 24 hours notice," and then
23 another court sets a date?

24 THE COURT: If he was told that back before I
25 set this date in October--what was it, October 8th?

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2 MR. VISCARRONDO: October 12th, your Honor.

3 THE COURT: October 12th.

4 If on October 12th he knew that he was going to
5 be on a 24 hour standby status for the state court trial
6 during the month of December, or any time close to it and he
7 knew that the had this firm trial date, he should have
8 arranged to have gotten himself out of one case or out of
9 the other. You cannot keep too many balls in the air at once.

10 MR. WENDY: You are right, your Honor, except
11 that barring that mistrial and misfortune, he would have been
12 available here, I believe.

13 THE COURT: Oh, the mistrial took a day, a day.
14 What is slowing that up is the fact, as you have indicated,
15 the judge is sitting only half a day.

16 MR. WENDY: Yes, that is true.

17 THE COURT: This is something that could have
18 been learned in adance and, indeed, probably was known to
19 him.

20 MR. WENDY: Your Honor, are you aware of the
21 vagaries of judges? The judge just told Mr. Kassner he
22 is going on vacation this weekend and this trial will be
23 finished if they have to work until midnight on Friday.
24 That is why I say Mr. Kassner will be available on Monday.

25 THE COURT: Well, I am not aware of the

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2 vagaries of the particular judge to whom you are referring,
3 although I know him, and I am aware of unfortunate conflict
4 between federal and state courts, which I think is regrettable.

5 But while there conce was a feeling that the
6 federal courts had an inherent precedence over the state
7 courts, I don't know that this is necessarily so. But I do know
8 that since we are operating under speedy trial deadlines that
9 are forced upon us and they are not operating under such
10 deadlines, at least at the present time when there is
11 a conflict, either counsel gets himself out of the conflict,
12 or if through complete innocence of counsel two matters
13 collide, the state matter will have to give way.

14 MR. WENDY: Your Honor, with regard to the
15 fines, I don't know what the Court has intended. You have
16 imposed a \$500 fine on three occasions.

17 THE COURT: Correct.

18 MR. WENDY: Are these stayed pending the Court
19 of Appeals?

20 THE COURT: They are stayed, A, pending Court
21 of Appeals action on your application for mandamum and, B,
22 pending my consideration thereafter whether I should refer
23 the matter to another judge.

24 If the Court of Appeals takes no action to
25 assist you or to guide me and if I decide against referring

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it to another judge, then I will ask the U.S. Attorney's office to prepare the appropriate order and judgment and to submit it to me for signature, after which you can take such action as you deem appropriate.

MR. WENDY: Thank you, your Honor.

MR. VISCARRONDO: Your Honor, if you should decide to submit it to another judge, I--

THE COURT: The way you will know about it is I will come out to what amounts to an opinion reciting the background of this and indicate that I am referring the contempt citation either to a specific judge if I am told of one or to the assignment panel otherwise and that way you will know where you are going.

MR. VISCARRONDO: Very good.

MR. WENDY: Would your Honor take an application that if we start this trial on January the 4th or any day thereafter that your Honor designates, would he consider removing these fines or rescinding these fines?

THE COURT: I doubt it very much. The damage has been done. A week's court time has been wasted. The government's preparation has been wasted, the witness has been wasted, the jurors have been wasted.

I have never seen an exact figure on what it costs the government to run a single trial part, but I think

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2 if you took into account overhead and all the collateral
3 salaries, such as cleaning people and extra court reporters and
4 everything else that goes into it, it probably costs the
5 government several thousand dollars per trial day. That would
6 be my rough estimate.

7 The fines as served upon you are substantially
8 less than the actual loss to the government by the carrying
9 over of this case. And I want to make it again very clear,
10 if it has not been clear all the while, that these fines are
11 levied against your client and are to be paid by you and not
12 by your client and are not to be embodied in any bills
13 submitted to him.

14 MR. WENDY: Well, I don't understand that order,
15 your Honor. In other words, you are saying that I cannot
16 bill him any more?

17 THE COURT: Oh, no, you can bill him for your
18 time.

19 MR. WENDY: A part of the money he pays me or
20 my firm cannot be used to pay this fine?

21 THE COURT: No, I did not say that at all.
22 What I am saying is, you can charge him for your time in
23 court and out of what he pays you you may pay the fine, but
24 you may not raise his legal fees in this matter because you
25 individually have been fined.

Affidavit of Actual Engagement.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA :
-v.- :
HERVIN M. HARRIS, : AFFIDAVIT OF ACTUAL
 : ENGAGEMENT
Defendant. : Criminal Action No.:
 : 76 Cr. 602(GLG)
-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

HERBERT S. KASSNER, being duly sworn, deposes and says:

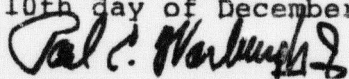
I am a member of the firm of Kassner & Detsky, attorneys for the Defendant in the above-entitled action and I am in charge of the defense of this case. I make this affidavit in support of a request for a continuance of the trial of this action scheduled for December 13, 1976.

On December 13, 1976, I will be actually engaged in the trial of the People of the State of New York v. Abe Hendy before the Hon. George Roberts in Part 31 of the Supreme Court of the State of New York, County of New York. The trial commenced on December 8, 1976, and will probably end on or about December 17, 1976.

Because of my actual engagement, I respectfully request that the trial of the above-entitled action be continued until December 20, 1976.


HERBERT S. KASSNER

Sworn to before me this
10th day of December, 1976



Notary Public in and for the State of New York
My Comm. Expires 12-31-1977
Qualified in Suffolk County

United States Court of Appeals, Second Circuit
Decision on Writ.

76-3082

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Howard Wendy,

Petitioner,

v.

Honorable Gerard L. Goettel, United
States District Judge for the Southern
District of New York,

Respondent.

United States of America,]
Plaintiff,]

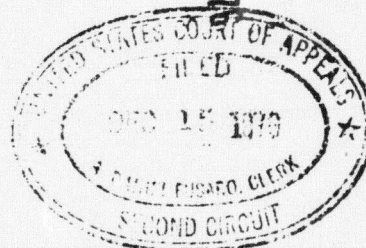
v.]

Hervin Harris,]
Defendant.]

A petition for a writ of mandamus having been filed

together with a motion for a stay,

Upon consideration thereof, it is



Decision on Writ.

Ordered that said petition be and it hereby is granted
denied

Ordered that ~~an answer to said petition shall be filed~~
~~by the respondent before~~

~~the clerk shall serve a copy of~~
~~this order on the judge(s) named respondent(s) and on~~
~~all other parties to the action in the trial court~~

~~further ordered that stay pending determination of~~
~~said petition be and it hereby is granted xxxxxxxxxxxx denied~~

December 15, 1976

(A true copy.

{ A Daniel Duane Clerk

William H. Mulligan
William H. Mulligan

W. H. Timbers
William H. Timbers

Elsworth A. Van Graafeiland
Elsworth A. Van Graafeiland
Circuit Judges

Memorandum From Judge Goettel to Judge Pollack.

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : JUDGE POLIACK
Reassignment Committee

DATE: December 21, 1976

FROM : JUDGE GOETTEL

SUBJECT: IN THE MATTER OF HOWARD WENDY, ESQ.
(U.S. v. Harris, 76 Cr. 0602)

I am referring herewith, for assignment to another judge, a contempt against an attorney.

On June 29, 1976, a criminal tax indictment was returned against Herven M. Harris. On July 8th the defendant appeared with Howard Wendy as counsel and pled not guilty. Mr. Wendy filed a notice of appearance and indicated that he was of the firm of Kassner & Detsky. On July 19th he filed a similar notice of appearance. During the subsequent months, several pre-trial conferences were held at which Mr. Wendy indicated he was having difficulty in preparing his defense for a variety of reasons, including unavailability of his client. Finally, on October 12th, it became necessary to set a date for trial, despite Mr. Wendy's difficulties. Having been advised that the six-month rule would expire at the end of the year, I set December 13th for trial. This date was satisfactory to counsel. Throughout all of these occasions there was never any indication that any attorney other than Mr. Wendy was to be involved in the trial representing the defendant.

On Friday, December 10th, (the last court day before the scheduled trial date) my chambers received a call from Mr. Wendy stating in essence that his partner, Mr. Kassner, was going to try the case, that Mr. Kassner was engaged in a state court trial, and that a continuance of a week or two was requested. He was advised that a continuance could not be granted and that the case would have to go ahead as scheduled on December 13th.

On December 13th, Mr. Wendy and his client appeared in the scheduled court for trial, but refused to go forward. Mr.



Memorandum.

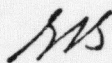
Wendy stated that he had never tried a criminal case and was incompetent to do so and that to compel him to proceed would deprive his client of adequate representation. (Counsel is retained and not appointed.) He stated that Mr. Kassner was always the intended trial counsel (although no mention was made of this), that Mr. Kassner knew of the planned trial date but that in the interim Mr. Kassner had started a state court criminal trial which was lasting much longer than expected. I advised him that this was not an adequate excuse and that he was attorney of record, that I had another important case scheduled for the following week, that I had nothing else scheduled for this week, that the Government had brought their witnesses from various parts of the country and was prepared to proceed, that a jury panel was being held waiting to be selected, and that unless he proceeded I would find him in contempt and fine him \$500. Mr. Wendy replied that if that were the only alternative he would have to be fined because he could not try the case. I therefore found him in contempt and assessed the fine and told them to appear again the following morning.

On the following day, December 14th, the same discussion was had and an additional \$500 fine assessed. In the interim, however, Messrs. Wendy and Kassner had filed a writ of mandamus in the Court of Appeals. I advised him that unless the Court of Appeals took some action they should return on the following day prepared to go to trial and that if still unwilling to proceed another fine would be assessed.

On the morning of December 15th, the same scenario was reenacted. The Court of Appeals had not taken any action on the petition for a writ. (Later on the same day their decision was issued denying the petition without opinion.) I advised counsel that we had now reached a point where it would be purposeless to continue calling the case for trial since there was inadequate time to complete it in light of my other engagements. With no other alternative, I made a finding that the interests of justice merited carrying the case beyond the Speedy Trial deadline (thereby acceding to the defendant's request) and the case has been adjourned sine die until early January.

Memorandum.

I consider the action taken to have a civil contempt, although an argument can be made that it was criminal and required compliance with Rule 42(b). In any event, in light of Footnote 4 to the Second Circuit's recent opinion in In Re: John Joseph Sutter, Esq. (#136, decided October 20, 1976), it would appear that the matter of costs should be referred to another judge. Copies of the papers filed in the matter accompany this memorandum. Transcripts have been ordered.



G.L.G.

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----X
4 UNITED STATES OF AMERICA :

5 vs. :

6 HERVEN M. HARRIS, :

7 Defendant. :

8 (IN THE MATTER OF HOWARD WENDY, ESQ.) :
9 -----X

76 Cr. 602
TJG

10 Before:

11 HON. THOMAS P. GRIESA,

12 District Judge.
13

14
15 August 4, 1977
16 2:00 p.m.

17 APPEARANCES:

18 PAUL VIZCARRONDO, ESQ.,
19 Assistant U. S. Attorney.

20 Also Present:

21 HOWARD WENDY, ESQ.
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25

Transcript, August 4, 1977.

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THE COURT: As you may know, Mr. Wendy, the matter has been reassigned to me which was formerly before Judge Goettel, in which he fined you on separate occasions \$500 for contempt of court.

The purpose of the reference to me was to have another Judge look over the record and either -- and do whatever should be done. I see no reason on the present record to disagree with Judge Goettel in what he imposed.

I should say that I view it, as I think he did, as a civil contempt proceeding or civil contempt proceedings, plural, and since the orders of the Court were not obeyed the fines have to be collected unless they are changed.

I want to know if you wish any further proceedings or if there are any problems that you want to bring out. I don't want to take you by surprise and just call you in here and announce something, but I do think we better start the ball rolling and get this wound up. It has been pending an awfully long time.

I understand you are not with Kassner & Detsky any more?

MR. WENDY: That is correct.

THE COURT: Are you on your own?

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2 MR. WENDY: Yes, your Honor.

3 THE COURT: Let me just hear from you.

4 MR. WENDY: I would urge you to reconsider
5 the fine and certainly the amount of the fine. First
6 of all, there was no intent to disobey the Court's
7 orders. It was I think an error right from the start.
8 The first point was that I was never intended to be the
9 attorney of record and really the basis for this contempt
10 charge was the notice of appearance which said Howard
11 Wendy is the attorney as opposed to Kassner & Detsky.

12 Herven Harris has never hired Wendy. I
13 was a partner at Kassner and Kassner & Detsky was retained
14 and it was never intended that I would be the attorney
15 to try the case. The only basis that Judge Goettel
16 had for having me try the case was the fact that he said
17 you filed a notice of appearance in the name of Howard
18 Wendy.

19 At the time that I filed a notice of
20 appearance it was Kassner & Detsky that should have been
21 put down there and it was, for lack of a better word,
22 ignorance or stupidity I put Howard Wendy there. I
23 was not in practice at the time by myself.

24 THE COURT: What presented the problem to
25 Judge Goettel was an eleventh hour request for an

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2 adjournment, an eleventh hour notification that the case
3 couldn't come to trial. If indeed you had been the trial
4 lawyer you didn't have a conflict in the state courts
5 and as far as scheduling you could have tried it,
6 right?

7 MR. WENDY: Your Honor, there is no doubt
8 about it.

9 THE COURT: The problem arose because
10 Judge Goettel had not been told that Mr. Kassner was
11 going to try the case and all of a sudden it appeared
12 that Mr. Kassner had this conflict and Judge Goettel
13 was left with his week sitting empty and he just --

14 MR. WENDY: I would just like to point out
15 to the Court that, one, I did notify the U. S. Attorney,
16 I believe, two weeks before. I am not clear on that.

17 THE COURT: I think you are mistaken on
18 that. It was sort of the Thursday before the Monday.

19 MR. VIZCARRONDO: If I can make a statement,
20 your Honor. Mr. Wendy made an appearance as the attorney
21 for Mr. Harris at the beginning, not Kassner & Datsky,
22 but Mr. Wendy.

23 There were a series of pretrial conferences
24 in the case extending for a period of several months
25 before the trial date in December was set. At each of

Transcript, August 4, 1977.

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2 these pretrial conferences Mr. Wendy appeared and it
3 was Mr. Wendy who dealt with the Assistant United States
4 Attorneys to whom the case was assigned. There was
5 absolutely no indication to either the U. S. Attorney's
6 office or to Judge Goettel at any time during this period
7 that anyone other than Mr. Wendy would try this
8 case.

9 The case was set down for the date in
10 December. I believe several weeks, if not months, in
11 advance it was set down. Sometime during the week
12 before that trial, I believe it may have been Wednesday
13 or Thursday, Mr. Wendy informed me for the first time
14 that Mr. Kassner would be trying --

15 THE COURT: The case was set down for --

16 MR. VIZCARRONDO: I believe Monday, December
17 14. I am not sure if that is the correct date.

18 THE COURT: I think Monday was the 14th,
19 because that was the first day of any fines.

20 When were you told that Mr. Kassner would
21 try it?

22 MR. VIZCARRONDO: Sometime during the
23 preceding week.

24 THE COURT: I think the record shows it
25 was Thursday.

Transcript, August 4, 1977.

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2 MR. VIZCARRONDO: I may have an affidavit
3 here.

4 THE COURT: And then Judge Goettel got
5 word on Friday that there would be a request for an
6 adjournment.

7 MR. VIZCARRONDO: I stated in the affidavit
8 that I submitted to the Court of Appeals on Mr. Wendy's
9 petition for an order of mandamus against Judge Goettel.
10 I was informed by Mr. Wendy that Mr. Kassner would
11 try the case with him on Thursday, December 9, and as
12 I stated in my affidavit, I told Mr. Wendy at that time
13 that he should call Judge Goettel's chambers immediately
14 and give Judge Goettel that information.

15 Apparently Mr. Wendy did not do so until
16 Friday, December 10, literally on the eve of trial or
17 the last working day before trial.

18 THE COURT: Go ahead.

19 MR. WENDY: Your Honor, the fact is very
20 simply, Mr. Kassner is a trial attorney. He has quite
21 a reputation. Mr. Kassner is not a tax expert. I
22 have a very capable tax background. I did do all the
23 pretrial conferences. I have done that many times.
24 I have never tried a case before. I have never tried
25 a federal tax case. This is a felony charge. I did

Transcript, August 4, 1977.

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2 not feel in -- first of all, Mr. Harris didn't hire
3 me. Mr. Harris would not let me try the case.

4 Mr. Harris is on the record that he didn't
5 want me as the attorney. I can't go in and say I will
6 try the case, Mr. Harris.

7 This is a charge where the man can go to
8 jail for up to five years. He was acquitted, perhaps
9 due to Mr. Kassner's expertise.

10 THE COURT: When did Mr. Kassner find out
11 he couldn't try the case?

12 MR. WENDY: The Thursday before. He had a
13 case with Judge Burton Roberts and he offered to go
14 with Judge Burton Roberts all through the night. There
15 was a matter pending there for three years. It had to
16 do with a bribery case for a city official and the man
17 was unable to appear.

18 Your Honor, I wasn't in practice for
19 myself and hired Mr. Kassner as my trial counsel and
20 said --

21 THE COURT: That isn't the point. In
22 other words, he had a case which was lasting longer
23 than expected, wasn't that it?

24 MR. WENDY: Yes.

25 THE COURT: Is that it?

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2 MR. WENDY: Yes, he was engaged in a
3 three-week trial, I believe, at the time.

4 THE COURT: He had expected it to be
5 over?

6 MR. WENDY: Right, and Judge Burton
7 Roberts had a calendar call so they started working
8 each day at 2 o'clock instead of starting at 9 o'clock
9 in the morning so the man was unable to appear here.
10 That is not Mr. Kassner's fault.

11 THE COURT: When did the Harris case get
12 tried?

13 MR. VIZCARRONDO: January by Judge Goettel.

14 THE COURT: And did Mr. Kassner try it?

15 MR. VIZCARRONDO: Yes.

16 MR. WENDY: Judge, the point is simply
17 this: There would certainly be no civil contempt
18 charge here if I had put in a notice of appearance
19 Kassner & Detsky, instead of Howard Wendy. I was and
20 had been a partner in that firm since November 1. There
21 is no way on earth that Judge Goettel or any other Judge
22 can say "You try the case."

23 The whole basis was that I inadvertently
24 put down Howard Wendy on the notice of appearance. I
25 had no bank account in the name of Howard Wendy.

Transcript, August 4, 1977.

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2 Everything was in the name of Kassner & Detsky.

3 Kassner & Detsky was retained.

4 How can they say "You try the case"? I
5 have never tried that type of case. Mr. Harris stood
6 up and told the Judge he doesn't want me to try the case.
7 Can I then say "Judge, I will try the case"?

8 THE COURT: I guess what it boils down
9 to is the fact that Judge Goettel felt badly misled
10 into thinking that you would try it and at the last
11 moment there was this problem with Mr. Kassner. I do
12 have a feeling that if Mr. Kassner had been on the line
13 Judge Goettel would have known this problem before, would
14 he not?

15 MR. VIZCARRONDO: I would assume so. I
16 would assume Mr. Kassner would have kept Judge Goettel's
17 chambers apprised of the problem a lot earlier. I
18 believe Mr. Wendy's statement is incorrect in that I
19 don't believe it would have been proper for him to make
20 a notice of appearance in the name of the firm of Kassner
21 & Detsky. I believe an individual lawyer does have
22 to make an appearance for defendants so somebody should
23 be held responsible.

24 THE COURT: And it should have been Kassner.

25 MR. VIZCARRONDO: If he was going to

Transcript, August 4, 1977.

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2 represent Mr. Harris, I suppose so.

3 THE COURT: Do you have any views on the
4 contempt or do you want to voice any views?5 MR. VIZCARRONDO: I don't believe it is
6 appropriate for me to voice a view on the propriety
7 of the attempt one way or the other. I believe Judge
8 Goettel was vindicating what he believed to be the
9 rights of the Court.10 I would point out, though, that this
11 trial was set down on a date that was just within the
12 six-month expiration of the six-month period, which was
13 also why Judge Goettel, I believe, felt that Mr. Wendy
14 or Mr. Kassner acted improperly in not notifying him
15 of the problem earlier in light of the requirement to
16 have cases tried within six months.17 MR. WENDY: I would like to point out
18 the U. S. Attorney's office did not wish to try the
19 case during the Christmas period or any day respectfully
20 requested that it not be tried then, that it be tried
21 after that.22 MR. VIZCARRONDO: The record is clear
23 on this. We made it clear we would have tried the
24 case during the Christmas week.

25 THE COURT: Mr. Wendy, I will tell you my

Transcript, August 4, 1977.

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view. I think it was a matter of caution which caused Judge Goettel and the assignment committee to refer the matter to me. They were concerned about a footnote in a Court of Appeals case which might or might not be applicable to this kind of situation and out of an abundance of caution the matter was referred to me.

But I very strongly feel that the Judge who was on the line, the Judge who was trying to struggle with his scheduling problem and the Judge who was dealing with you and with this case, he has a right and a responsibility to impose civil contempt sanctions if he feels that the matter is of that seriousness.

I have reviewed the record of Judge Goettel. I have heard what you said and I believe I have no rational reason to second guess Judge Goettel on this. I think this goes to the authority of the Court to try to keep some order in its business and Judge Goettel was trying to do that.

I have read it and I feel it wasn't a matter of anger or passion or arbitrariness but a decision and a reasoned decision as to what sanctions he felt were justified.

So I will impose the total fine of \$1500 or confirm that fine, or however it should be phrased.

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Thank you very much.

Should there be a written order?

MR. VIZCARRONDO: I believe so.

THE COURT: You submit the order.

- - -

Order of Contempt.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

FILED
X SEP 8 1977

AUG 31 1977

S. D. OF N. Y.

ORDER OF CONTEMPT

HERVEN HARRIS,

76 Cr. 602

Defendant.

x

WHEREAS on October 12, 1976, the Honorable Gerard L. Goettel, United States District Judge for the Southern District of New York ordered that the trial in United States v. Herven Harris, 76 Cr. 602, would commence on December 13, 1976;

WHEREAS on December 13, 1976, after Judge Goettel ordered trial of the aforesaid case to commence as scheduled, Howard Wendy, Esq., attorney for the defendant throughout the proceedings on Indictment 76 Cr. 602, refused to proceed with the trial;

WHEREAS Judge Goettel, finding this refusal to comply with the order of the Court to be without good cause, held Mr. Wendy in contempt of Court and fined him \$500;

WHEREAS on December 14, 1976 and December 15, 1976, Howard Wendy, Esq., again refused to proceed with the trial after Judge Goettel ordered him to do so, and Judge Goettel again found him in contempt of Court and fined him \$500 on each of those dates;

Order of Contempt.

rv:dl

" WHEREAS this matter was thereafter referred to this Court to review Judge Goettel's findings of contempt and the fines imposed, it is, upon all the proceedings and papers heretofore had herein,

ORDERED, ADJUDGED AND DECREED, that Howard Wendy, Esq., was in contempt of Court on December 13, 1976, on December 14, 1976 and on December 15, 1976, by refusing to proceed to trial as ordered in United States v. Herven Harris, 76 Cr. 602; and it is further

ORDERED, ADJUDGED AND DECREED, that Howard Wendy, Esq., shall be fined five hundred dollars (\$500.00) for each of the three days that he was in contempt of Court, or a total of fifteen hundred dollars (\$1500.00); and it is further

ORDERED, ADJUDGED AND DECREED, that Howard Wendy, Esq., is directed neither to seek nor enter into any agreement of indemnification with nor be indemnified, directly or indirectly, by any person, organization or entity with respect to the monies ordered paid under this order; and it is further

Order of Contempt.

ORDERED, ADJUDGED AND DECREED, that Howard Wendy,
Esq. shall pay to the Clerk of this Court, on or before
October 19, 1977, a cashier's or certified check, made
payable to the Treasurer of the United States, in the amount
of fifteen hundred dollars (\$1500.00).

Thomas P. Griesa
THOMAS P. GRIESA
United States District Judge

Sept. 6, 1977.

United States Court of Appeals
for the Second Circuit

United States of America,

Plaintiff-Appellee,

against

Howard Wendy,

Defendant-Appellant.

**AFFIDAVIT
OF SERVICE**

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Stan Miller

, being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides
at 1405 College Avenue, Bronx, New York

That on November 25, 1977 he served 1 copies of Appendix
and 2 copies of brief

on
Robert B. Fiske, Esq.,
US Attorney for the Southern District,
1 St Andrew Plaza,
New York, New York.

by delivering to and leaving same with a proper person or persons in
charge of the office or offices at the above address or addresses during
the usual business hours of said day.

Stan Miller
.....

Sworn to before me this

25 day of November , 19 77.

John V. Wierzbicki
JOHN V. WIERZBICKI
Notary Public, State of New York
No. 80-0932350
Qualified in Nassau County
Commission Expires March 30, 1979